No. 85-305

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL E. FRYZEL, Director,
Department of Financial Institutions,

Petitioner,

vs.

CASH CURRENCY EXCHANGE, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Seventh Circuit ordering the administrative receiver who was vested with title to and control over the assets of 33 community currency exchanges pursuant to the Illinois Community Currency Exchange Act, Ill. Rev. Stat. ch. 17, §4801 *et seq.* to turn over said assets to the bankruptcy trustee constitutes an unwarranted interference by the federal bankruptcy courts with the State of Illinois' regulation and liquidation of community currency exchanges as enacted by the Illinois legislature in the aforementioned Act.

2. Whether the Seventh Circuit's holding that the administrative receiver duly appointed by the Illinois Director of Financial Institutions is a "custodian" within the meaning of Section 101(10) of the Bankruptcy Code, 11 U.S.C. §101(10), is incorrect and constitutes a violation of the separation of powers doctrine in that the Illinois legislature has committed the control over the regulation and liquidation of community currency exchanges to the Department of Financial Institutions and the federal bankruptcy court thus may not substitute its trustee to interfere with the state proceedings.

PARTIES

The Respondents in this Petition, as set forth in the caption as "CASH CURRENCY EXCHANGE, INC., *et al.*" include DONALD C. SHINE, RECEIVER; the 33 debtor community currency exchanges located in Illinois: 59TH & HALSTED CURRENCY EXCHANGE, INC., PULASKI JACKSON CURRENCY EXCHANGE, INC., DIVISION DAMEN CURRENCY EXCHANGE, INC., LAKE LARAMIE CURRENCY EXCHANGE, INC., 147TH & LOOMIS CURRENCY EXCHANGE, INC., NORTH HALSTED CURRENCY EXCHANGE, INC., CICERO CHICAGO CURRENCY EXCHANGE, INC., OGDEN KEDZIE CURRENCY EXCHANGE, INC., ROOSEVELT AUSTIN CURRENCY EXCHANGE, INC., LAKE PULASKI CURRENCY EXCHANGE, INC., CHICAGO CENTRAL CURRENCY EXCHANGE, INC., ZENITH CURRENCY EXCHANGE, INC., BELMONT KIMBALL CURRENCY EXCHANGE, INC., KEDZIE CARROLL CURRENCY EXCHANGE, INC., BROADWAY LAWRENCE CURRENCY EXCHANGE, INC., 79TH & EXCHANGE CURRENCY EXCHANGE, INC., JACKSON HOMAN CURRENCY EXCHANGE, INC., 51ST & ASHLAND CURRENCY EXCHANGE, INC., 85TH & BURLEY CURRENCY EXCHANGE, INC., 69TH & ASHLAND CURRENCY EXCHANGE, INC., LARAMIE LAKE CURRENCY EXCHANGE, INC., MADISON CALIFORNIA CURRENCY EXCHANGE, INC., MADISON OAK PARK CURRENCY EXCHANGE, INC., ASHLAND GRAND CURRENCY EXCHANGE, INC., MADISON DAMEN CURRENCY EXCHANGE, INC., CENTRAL DIVISION CURRENCY EXCHANGE, INC., ROOSEVELT DAMEN CURRENCY EXCHANGE, INC., CICERO ARMITAGE CURRENCY EXCHANGE, INC., 51ST & HALSTED CURRENCY EXCHANGE, INC., CHICAGO CLARK CURRENCY EXCHANGE, INC., MILWAUKEE CLARK CURRENCY EXCHANGE, INC., 43RD & COTTAGE GROVE CURRENCY EXCHANGE, INC., and BREMENTOWNE CURRENCY EXCHANGE, INC.; TRAVELERS' EXPRESS CO., and UNSECURED CREDITORS' COMMITTEE.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on May 21, 1985 and has not yet been reported. It is reprinted herein at Appendix A. The opinion of the United States District Court for the Northern District of Illinois is reported at 37 B.R. 617 (D.C. 1984). It is reprinted herein as Appendix B.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on May 21, 1985. No petition for rehearing was filed. This petition for a Writ of Certiorari is timely filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

(The text of these provisions are reprinted herein as Appendix C).

Federal Laws

11 U.S.C. §101(10)
11 U.S.C. §109(b)(2)
11 U.S.C. §362(b)(4)
11 U.S.C. §543

State Laws

Ill. Rev. Stat. ch. 17, §4801 *et seq.*

STATEMENT OF THE CASE

The State Law:

The Illinois Community Currency Exchange Act, Ill. Rev. Stat., ch. 17, §4801 *et seq.* regulates the operation of community currency exchanges in Illinois. Section 4802 of the Act defines "Community currency exchange" as

> Community currency exchange means any person, firm, association, partnership or corporation, except an ambulatory currency exchange as hereinafter defined, banks incorporated under the laws of this State and National Banks organized pursuant to the laws of the United States, engaged in the business or service of, and providing facilities for, cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services.

The public policy behind the Act is set forth in §4809 as being that:

> The General Assembly finds and declares that community currency exchanges provide important and vital services to Illinois citizens, that the number of community currency exchanges should be limited in accordance with the needs of the communities they are to serve, and that it is in the public interest to promote and foster the community currency exchange business and to insure the financial stability thereof.

The Act sets forth administrative receivership and liquidation procedures regarding the exchanges at §§4825-4831, with §4825 stating, in part, as follows:

> If the Director determines that any licensee is insolvent or is violating this Act, he shall appoint a receiver, who shall, under his direction, for the purpose of receivership, take possession of and title to the books, records and assets of every description of the community currency exchange . . .

The Act further provides that until possession of a currency exchange is returned to the licensee or a liquidation proceeding is completed, the Illinois Director of Financial Institutions or the Receiver controls the exchanges' assets and the Receiver may operate the exchanges. §§4825-4826.

Creation of Administrative Receivership

On or about January 31, 1983, 33 community currency exchanges located in Illinois were placed under administrative receiverships pursuant to the Illinois Community Currency Exchange Act, Ill. Rev. Stat., ch. 17, §§4801-4852 (1983) (hereinafter the "Act"). This action was taken by Michael E. Fryzel, Director of the Illinois Department of Financial Institutions, (hereinafter the "Director") after an examination of the books and records of these exchanges by the Department revealed that the liquid funds of all of the 33 exchanges were substantially impaired in violation of Section 7 of the Act (B.Tr. 2/11/83, pp. 10, 26).*

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* To facilitate citation to the record, "Record Item" is abbreviated as "R." and the Record from the bankruptcy court is abbreviated as "R.1-1," etc. Transcript of Proceedings from the bankruptcy court is abbreviated as "B.Tr." and from the district court as "D.Tr."

During the subsequent ten-day period, Donald C. Shine, the Receiver appointed by Director Fryzel, took control over the exchanges—conducting audits, remedying security problems, establishing new bank accounts, and reestablishing service operations. Each of the 33 exchanges was reopened to the public within 48 hours after being initially closed (R. 22; Affidavit of Donald C. Shine).

Initiation of Bankruptcy Proceedings

On February 10, 1983, the thirty-three currency exchange corporations filed voluntary petitions for reorganization in the United States Bankruptcy Court for the Northern District of Illinois under 28 U.S.C. §1334 pursuant to the Bankruptcy Reform Act of 1978, 11 U.S.C. Sections 101 *et seq.* (1979). These filings were not authorized by Director Fryzel nor by Receiver Shine, who had been vested in title to the assets of the 33 exchanges pursuant to Section 15.1 of the Act.

After filing the Chapter 11 petitions, the 33 exchanges located in Illinois presented an application on February 11, 1983 in the Bankruptcy Court seeking an order requiring the Director's receiver to turn over the exchanges' property to the bankruptcy trustee (Supp. to Record). The Director sought and was granted leave on February 18, 1983 to intervene in the adversary turnover proceeding and the Chapter 11 proceeding, although on a limited basis (R. 1-71).

The Director then moved to dismiss the application and the 33 Chapter 11 petitions (R. 1-75, 76). Both motions were denied in separate orders dated February 18, 1983 (R. 1-77). The Bankruptcy Court subsequently ordered the appointment of Mr. Shine as bankruptcy trustee and ordered the Director's receiver to turn over the assets of the 33 exchanges to the trustee.

Appeal to the U.S. District Court

The Director appealed to the U.S. District Court for the Northern District of Illinois under 28 U.S.C. §1334(b) from six Bankruptcy Court orders dated February 18, 1983 as follows (the first three orders were entered in the Chapter 11 proceedings; the other three orders were entered in the turnover proceeding):

> (1) the order granting limited intervention rights to the Director; (2) the order denying the Director's motion to dismiss the chapter 11 petitions or, in the alternative, to abstain; (3) the order appointing a bankruptcy trustee; (4) the order granting limited intervention rights to the Director; (5) the order denying the Director's motion to strike and dismiss the turnover proceedings; and (6) the order requiring the Director's receiver to turn over the exchanges' property to the bankruptcy trustee.

On appeal to the District Court, the Director argued that the community currency exchanges may not be debtors under the Bankruptcy Code since the exchanges are public financial institutions which are regulated by the State of Illinois in a manner closely analogous to that of other financial institutions excluded from being debtors in bankruptcy by their listing in Section 109(b)(2) of the Bankruptcy Code. 11 U.S.C. §109(b)(2) (1985). Specifically, the Director argued that, applying the "state classification" test set forth in *First American Bank & Trust Co. v. George*, 540 F.2d 343, 349 (8th Cir.), *cert. denied*, 429 U.S. 1011 (1976), the exchanges are subject to extensive regulation by the State, they are subject to express statutory procedures for liquidation, and the nature of their business is public or quasi-public and involves interests other than those of the creditors.

The Director further contended that the administrative receiver Shine, appointed under Ill. Rev. Stat. ch. 17,

§4825 (1983), was vested with possession and exclusive title to the assets of the 33 exchanges upon his appointment by the Director, thus the Bankruptcy Court's appointment of a bankruptcy trustee and its Order requiring that the receiver turn over the property pursuant to 11 U.S.C. §543 constituted "an improper interference with the State of Illinois' police and regulatory powers over currency exchanges." Director District Court Brief at 12.

The Director further contended that the Bankruptcy Court did not have power to stay the state proceedings pursuant to 11 U.S.C. §362(b)(4) since the state proceeding brought pursuant to Ill. Rev. Stat. ch. 17, §4825 constituted "an action or proceeding by a governmental unit's police or regulatory power" and that the U.S. Bankruptcy Court should abstain from hearing the Chapter 11 petitions.

The U.S. District Court for the Northern District of Illinois on appeal, while recognizing that the community currency exchanges were public or quasi-public in nature, determined that the regulatory or liquidation procedures of Illinois relating to community currency exchanges did not vindicate the public interest but rather the rights of creditors, and also rejected the Director's argument that the exchanges should be excluded from being debtors under the Bankruptcy Code. The District Court emphasized in its affirmance the currency exchanges' inability to perform the "essential attributes" of a banking institution—accepting deposits and loaning money (District Court Op. at B-9 and B-10).

Seventh Circuit Court of Appeals

The Director appealed the rulings of the District Court to the U.S. Court of Appeals for the Seventh Circuit

under 28 U.S.C. §1293(b). The Director reiterated his arguments made on appeal before the District Court, adding that the District Court erred in holding that the administrative receiver is a custodian under Section 101(10) of the Bankruptcy Code.

The Seventh Circuit held that the three orders entered in the context of the Chapter 11 proceeding were not appealable at that time and affirmed the District Court regarding the three orders entered in the context of the turnover proceedings.

REASONS FOR ALLOWING THE WRIT

INTRODUCTION

The pivotal question posed by this case is whether the Seventh Circuit erroneously affirmed the affirmance by the District Court of the orders of the Bankruptcy Court requiring the Receiver appointed by the Illinois Director of Financial Institutions to turn over the assets of the 33 currency exchanges to the Bankruptcy Trustee. Or, since Donald Shine was both Receiver and Trustee, in essence the question becomes whether the Seventh Circuit properly required Mr. Shine as a trustee to report to a federal bankruptcy judge instead of being responsible as a receiver only to the state regulatory authorities created by an enactment of the Illinois legislature. The State submits that this result is improper and review by this Court is warranted for two reasons:

I.

THE SEVENTH CIRCUIT'S DECISION ORDERING THE RECEIVER WHO WAS VESTED WITH TITLE TO AND CONTROL OVER THE ASSETS OF THE 33 COMMUNITY CURRENCY EXCHANGES PURSUANT TO THE ILLINOIS COMMUNITY CURRENCY EXCHANGE ACT, ILL. REV. STAT., CH. 17, § 4801 *ET SEQ.*, TO TURN OVER SAID ASSETS TO THE BANKRUPTCY TRUSTEE CONSTITUTES AN UNWARRANTED INTERFERENCE BY THE FEDERAL BANKRUPTCY COURTS WITH ILLINOIS' REGULATION AND LIQUIDATION OF COMMUNITY CURRENCY EXCHANGES AS ENACTED BY THE ILLINOIS LEGISLATURE IN ITS PASSAGE OF ILL. REV. STAT. CH. 17, §4801 *ET SEQ.*

Community currency exchanges, often referred to as "poor man's banks", perform invaluable financial functions at their over-six hundred locations in Illinois for the downtrodden of society who cannot afford to utilize banks, especially in light of the current practice of most banks to charge customers for each check and to require minimum balances in checking accounts. What the Seventh Circuit failed to realize in concluding that currency exchanges do not constitute the "substantial equivalent" of a bank, Seventh Circuit Op. at A-12, is that community currency exchanges fill more of a vital public service function in meeting the everyday financial needs of its customers, regardless of whether they are empowered to receive deposits or loan money, than do the more traditional banks for their public customers.

As acknowledged by the Seventh Circuit, no previous cases have ruled on whether currency exchanges constitute the equivalent of banking institutions under the "state classification test" and thus should be excluded as debtors under the Bankruptcy Code, and it is crucial that this Court provide insight as to the true nature of serv-

ices provided by the community currency exchanges in order to ensure that the state regulation of such exchanges in the public interest not be unnecessarily usurped by the operation of the bankruptcy proceedings at greater expense for solely the interest of creditors. In this vein, it is important for this Court to also recognize the need to give priority to state regulation of currency exchanges over bankruptcy relief in order to protect the public interest as opposed to merely that of the creditors.

The community currency exchanges not only cash their customers' meager paychecks to provide them with their subsistence-level funds but also proceed to sell money orders to those customers which are utilized in lieu of checks to pay their rent and utility bills. The currency exchanges in Illinois are the distribution centers for food stamps and also for aid checks, which are delivered directly to the exchanges in order to safeguard their proper receipt. These exchanges thus perform a multitude of financial services for the poor.

It is essential for the protection of the public that these institutions be adequately regulated under the police powers of the State to assure that the moneys handled are adequately received and disbursed. For instance, since the money paid by the customer for the money orders is not due to the payee until it goes through the banking chain of collection, public funds known as "the float" are at risk. Were these funds not to be available upon demand, a crisis would ensue which could have a dire impact on the ability of the poor to be able to effectuate the simplest financial transactions—a void which modern-day banks will likely not choose to fill.

However, the Illinois legislature has chosen to protect its citizens from such pitfalls by enacting a comprehensive set of regulations regarding community currency ex-

changes more extensive than those of any other state. An essential aspect of these regulations are the liquidation procedures set forth in Sections 4825-4830 of Chapter 17 of the Illinois Revised Statutes which provide that the Director may appoint a receiver to handle claims against an exchange if the Director determines that possession should be turned over to the licensee or that the business should be liquidated. The effectiveness of such procedures in protecting the public interest is illustrated by the fact that no public funds have ever been lost since the Illinois currency exchanges first became regulated in 1943.

The vital need for the State of Illinois to regulate the currency exchanges in the public interest because of the nature of the financial services provided by the exchanges was recognized by the Illinois Supreme Court in *McDougall v. Lueder*, 389 Ill. 141, 58 N.E.2d 899 (1945). In *McDougall*, while the Court upheld the prohibition of currency exchanges from accepting deposits, it also upheld, over due process objections, the regulation of currency exchanges, stating as follows (389 Ill. at 149-150):

> Any business conducted primarily or entirely by accepting funds of other people, undertaking to keep the funds intact for an indefinite length of time and the purchasing of paper, such as cashing checks or money orders, is *one in which the public deserves more protection than only the judgment, skill and good luck of the proprietor to protect it against loss.* The opportunities for loss through embezzlements, larceny, the unauthorized use of funds, including bankruptcy through the mishandling of funds, is obvious. *Reasonable regulation thereof falls within the powers of the legislature in the interests of the public safety.* (emphasis added)

The existence of an elaborate scheme of liquidation set up by a state to regulate a trust company was held by the Fifth Circuit to preclude the intervention of bankruptcy proceedings in *Woolsey v. Security Trust Co.*, 74 F.2d 334 (5th Cir. 1935), recognized by the Seventh Circuit at A-17 but not followed. In *Woolsey*, the Court interpreted section 109(b) of the Bankruptcy Code as excluding trust companies as debtors (though trust companies, like community currency exchanges, were not specifically excluded in Section 109(b)), stating as follows (74 F.2d at 337):

> It was considered that *it would be a ruinous thing to the state, to the depositors, and to the creditors to have the elaborate scheme of liquidation which the state provides broken into and nullified by bankruptcy proceedings*, and it was intended, by withdrawing jurisdiction over these corporations from the bankruptcy court, that this would not occur. (emphasis added)

The State of Illinois agrees with the principles set forth by the Fifth Circuit in *Woolsey* and urges this Court to hold that "community currency exchanges" do not constitute debtors under the Bankruptcy Code and to reverse the decision of the Seventh Circuit requiring the administrative receiver to turn over the assets of the 33 exchanges to the bankruptcy trustee.

II.

THE SEVENTH CIRCUIT'S HOLDING THAT THE ADMINISTRATIVE RECEIVER DULY APPOINTED BY THE ILLINOIS DIRECTOR OF FINANCIAL INSTITUTIONS IS A "CUSTODIAN" WITHIN THE MEANING OF SECTION 101(10) OF THE BANKRUPTCY CODE, 11 U.S.C. §101(10), IS INCORRECT AND CONSTITUTES A VIOLATION OF THE SEPARATION OF POWERS DOCTRINE IN THAT THE ILLINOIS LEGISLATURE HAS COMMITTED CONTROL OVER THE REGULATION AND LIQUIDATION OF COMMUNITY CURRENCY EXCHANGES TO THE DEPARTMENT OF FINANCIAL INSTITUTIONS AND THE FEDERAL BANKRUPTCY COURTS THUS MAY NOT SUBSTITUTE ITS OWN TRUSTEE TO INTERFERE WITH THE STATE PROCEEDINGS.

While the Seventh Circuit recognized that "under Illinois law, administrative receivers have exclusive custody of and title to all assets of the entity placed under receivership, including causes of action," Seventh Circuit Op. at A-18, the Court went on to erroneously reject the argument of the Director that the term "custodian" encompassed only court-appointed receivers and not administrative receivers. Seventh Circuit Op. at A-21.

A "custodian" is defined in Section 101(10) of the Bankruptcy Code, 11 U.S.C. §101(10) (1979) as including a(n)

> (A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;
>
> (B) assignee under a general assignment for the benefit of the debtor's creditors; or
>
> (C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

Even though the legislative history suggests that the definition of "custodian" was descriptive rather than exhaustive, an examination of the cited legislative history, S.Rep. No. 989, 95th Cong. 2nd Sess 23 (1978), reveals that the definition is exhaustive only in that it not only encompasses certain specified receivers or trustees but also other *officers of the court* (emphasis added). See Seventh Circuit Op. at A-21.

Since the Receiver appointed by the Director this is not within the category of "custodian" as defined in Section 101.10 of the Bankruptcy Code, 11 U.S.C. §101.10 (1979), the substitution of a bankruptcy trustee by the Bankruptcy Court in place of an administrative receiver who had already taken legal custody and title to all of the assets of the entity under receivership was clearly improper and violative of the separation of powers clause as well as being an unwarranted federal interference into state regulatory processes. While it may be generally true, as noted by the District Court at B-18, that "a corporation cannot be prevented by state statute from taking advantage of bankruptcy law," the situation is distinguishable where, as in the case at bar, the 33 currency exchanges are not mere corporations but are financial institutions whose recognition and continued existence is traceable to the Community Currency Exchange Act. Ill. Rev. Stat. ch. 17, §4801 *et seq.* (1983).

In so holding that the Receiver was a "custodian" and thus the assets of the exchanges could properly be deemed property of the debtor for purposes of turnover pursuant to section 343 of the Bankruptcy Code, the Seventh Circuit ignored the holding of the Second Circuit in *Israel-British Bank (London) Ltd. v. Fed. Dep. Ins. Corp.*, 536 F.2d 509 (2nd Cir. 1976). The Second Circuit in *Israel-British Bank* held that in determining which institutions

constituted debtors under the Bankruptcy Act, "the inference is that *considerations of federalism* required that the states be allowed to liquidate as well as to regulate *their own creations*" (536 F.2d at 514) (emphasis added). Such considerations of federalism also require that the state-created processes for the regulation and/or liquidation of the state-licensed community currency exchanges to be exercised by the receiver not be interfered with by the intervention of the federal bankruptcy laws.

The State of Illinois urges this Court to hold that the administrative receiver appointed by the Illinois Director of Financial Institutions is not a "custodian" under the Bankruptcy Code and thus reverse the order requiring the receiver to turn over the assets of the exchange to the trustee.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE
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FOR THE SEVENTH CIRCUIT

No. 84-1340

CASH CURRENCY EXCHANGE, INC., et al.,

Debtors,

CASH CURRENCY EXCHANGE, INC., et al.,

Plaintiffs,

v.

DONALD C. SHINE, RECEIVER,

Defendant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 83 C 2640, 83 C 2641, 83 C 3015, 83 C 3016, 83 C 3017,
83 C 3021, (83 B 1933 through 83 B 1989) (83 A 499)—
John A. Nordberg, *Judge.*

ARGUED SEPTEMBER 24, 1984—DECIDED MAY 21, 1985

Before BAUER, WOOD, and CUDAHY, *Circuit Judges.**

* The debtors have filed a motion to strike portions of the Director's brief on the ground that the arguments contained therein are based upon factual matters presented to the district court for the first time in an affidavit attached to the Director's motion for reconsideration. The motion was denied in a minute order and we are unable to tell whether the district court refused to consider the affidavit or simply determined that the matters contained in the affidavit did not alter its decision. The Director apparently did not file with the district court a motion to supplement the record on appeal to which debtors then would have been permitted to respond. In light of this, we grant debtors' motion to strike, but note that in any event the factual matters contained in the affidavit would not affect our determination of the issues presented on appeal.

WOOD, *Circuit Judge.* This appeal raises the novel issue whether community currency exchanges, which are engaged in the businesses of cashing checks and money orders for a fee and selling or issuing money orders, may be debtors under the Bankruptcy Code.

On February 10, 1983, fifty-seven currency exchange corporations filed voluntary petitions for reorganization under chapter 11 of the Bankruptcy Code. Thirty-three of these currency exchanges were located in Illinois. One week before the filing of these chapter 11 petitions, the thirty-three Illinois currency exchanges had been placed under administrative receiverships pursuant to the Illinois Community Currency Exchange Act, Ill. Rev. Stat. ch. 17, §§ 4801-4852 (1981) (the "Act"), which regulates the operation of currency exchanges in Illinois. The Illinois Director of Financial Institutions (the "Director") also had instituted proceedings to liquidate the thirty-three exchanges.[1]

After filing the chapter 11 petitions, the exchanges sought from the bankruptcy court an order requiring the Director's receiver to turn over the exchanges' property to the bankruptcy trustee. The exchanges' application was treated by the bankruptcy court as a complaint initiating an adversary proceeding. The Director sought and was granted leave to intervene in the adversary turnover proceedings and the chapter 11 proceedings. He then moved to dismiss the debtors' application for an order requiring his receiver to turn over the debtors' property

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[1] If the Director, who is responsible for administering the Act, determines that a licensee is insolvent or is violating provisions of the Act, he is authorized to appoint a receiver to take possession of and title to the books, records and assets of the licensee. Ill. Rev. Stat. ch. 17, § 4825. The receiver may operate the exchange until the Director determines that possession and title should be restored to the exchange or that the exchange should be liquidated. *Id.* at §§ 4825-4826. The Director or the Director's receiver controls the exchange's assets until possession is restored or a liquidation proceeding is completed.

and the debtors' chapter 11 petitions on the ground that the bankruptcy court lacked jurisdiction of the case. Both motions were denied. The bankruptcy court subsequently ordered the appointment of a bankruptcy trustee and ordered the Director's receiver to turn over the exchanges' assets to the trustee.

The Director filed separate notices of appeal to the district court from six bankruptcy court orders, and moved the district court for leave to appeal. The orders entered in the chapter 11 proceeding were (1) the order granting limited intervention rights to the Director; (2) the order denying the Director's motion to dismiss the chapter 11 petitions or, in the alternative, to abstain; and (3) the order appointing a bankruptcy trustee. The orders entered in the adversary turnover proceeding were (4) the order granting limited intervention rights to the Director; (5) the order denying the Director's motion to strike and dismiss the turnover proceedings; and (6) the order requiring the Director's receiver to turn over the exchanges' property to the bankruptcy trustee. The district court granted the Director's motion for leave to appeal, apparently assuming jurisdiction under 28 U.S.C. § 1334(b),[2] and consolidated the appeals.

The major issue on appeal to the district court was whether community currency exchanges are excluded from being debtors under section 109(b)(2) of the Bankruptcy Code. 11 U.S.C. § 109(b)(2). The district court held that they are not. It therefore rejected the Director's challenge to the bankruptcy court's jurisdiction, and affirmed all six orders. *In re Cash Currency Exchange, Inc.*, 37 B.R. 617 (N.D. Ill. 1984).

In its memorandum opinion and order, the district court suggested that its order might be appealed to this

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[2] Section 1334(b) provides that the district courts "shall have jurisdiction of appeals from interlocutory orders and decrees of bankruptcy courts, but only by leave of the district court to which the appeal is taken."

court (1) as a final order under the Bankruptcy Code; (2) as a final decision of the district court under 28 U.S.C. § 1291; (3) as a certified interlocutory appeal under 28 U.S.C. § 1292(b); (4) as a collateral order under the *Cohen* doctrine, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); or (5) as an interlocutory appeal under 28 U.S.C. § 1292(a)(2).

I.

The parties apparently have assumed that this court has jurisdiction of this appeal; the jurisdictional issue has not been briefed by either party. Because it is our duty to determine whether we have jurisdiction of this case, *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976); *In re Bassak*, 705 F.2d 234, 236 (7th Cir. 1983), we turn to an examination of this threshold issue.

Under the transitional provisions of the Bankruptcy Act of 1978, Pub.L. 95-598, tit. IV, § 405(c)(2), 92 Stat. 2685 (Nov. 6, 1978), which were in force when the Director appealed to the district court and to this court, "a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree" entered by a district court in an appeal from a bankruptcy court. 28 U.S.C. § 1293(b). The district courts' jurisdiction of appeals from decisions of the bankruptcy courts is not so limited. Final decisions of the bankruptcy court are appealable as of right to the appropriate district court. 28 U.S.C. § 1334(a). But the district court also is authorized to exercise its discretion to entertain interlocutory appeals from the bankruptcy court. 28 U.S.C. § 1334(b).

This court and others have held that a district court's decision on an appeal from a bankruptcy court's interlocutory order generally is not a final order for purposes of

further appellate review under section 1293(b).[3] *In re Riggsby*, 745 F.2d 1153, 1154 (7th Cir. 1984);[4] *In re Tidewater Group, Inc.*, 734 F.2d 794 (11th Cir. 1984); *In re Comer*, 716 F.2d 168 (3d Cir. 1983). And, a district court's decision on an appeal from a bankruptcy court's final order will be reviewed only if it also is final. *Riggsby*, 745 F.2d at 1155. Thus, an order by the district court remanding the case to the bankruptcy court for further significant proceedings will not be automatically and immediately appealable to this court, provided the order may be effectively reviewed on appeal from the bankruptcy court's "final final" decision. *Id.* at 1156.

With these basic principles in mind, we turn to an examination of the six orders appealed in this case. The orders entered by the bankruptcy court in the turnover

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[3] There are some exceptions to this rule. In some instances, the action taken by the district court may transform an interlocutory order of the bankruptcy court into a final order for the purpose of appellate review by this court. An obvious example would be an order by the bankruptcy court denying a motion to dismiss the proceedings for lack of jurisdiction. If on appeal the district court determined that the bankruptcy court lacked jurisdiction and reversed this order, the decision of the district court would be a final appealable order. Similarly, although a bankruptcy court order granting intervention is interlocutory, a district court decision reversing this order and denying intervention would be a final appealable order.

[4] In *Riggsby*, the transitional provisions of the 1978 Act were in force when the bank appealed to the district court and apparently the superseding amendments made in 1984 were in force when Riggsby appealed to this court. The 1984 amendments to the Bankruptcy Act of 1978 added two new jurisdictional sections to the Judicial Code: 28 U.S.C. §§ 157 and 158. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 333 (July 10, 1984). We noted that the jurisdictional provisions of the 1984 amendments are virtually identical to the jurisdictional provisions of the 1978 Act, *see* 28 U.S.C. §§ 1293(b) and 1334(a),(b), and appear to have the same meaning. We therefore justifiably rely upon cases applying the jurisdictional provisions of the 1984 amendments.

proceeding (4-6) were, in our view, final orders. Although the orders allowing limited intervention by the Director and denying the Director's motion to dismiss the turnover proceeding were interlocutory, they became final and appealable as such with the entry of the order requiring the Director's receiver to turn over the debtors' property to the bankruptcy trustee. Because this order terminated the adversary proceeding, all three orders were appealable to the district court as final orders. The district court's affirmance of these orders also was a final decision, appealable to this court under section 1293(b). *In re Tarnow*, 749 F.2d 464, 464-65 (7th Cir. 1984).[5]

The three orders entered in the context of the chapter 11 proceeding (1-3) stand on a different footing. The orders permitting limited intervention by the Director, denying his motion to dismiss the chapter 11 petitions, and appointing a bankruptcy trustee were interlocutory and reviewable only if the district court agreed to entertain the appeals. The affirmance of these orders by the district court did not alter their interlocutory character. It follows that this court does not have jurisdiction to review them under section 1293(b). The question remains whether they are reviewable under one of the special procedures for interlocutory appeals, several of which were suggested by the district court to be appropriate bases for our jurisdiction.

As we noted in *Riggsby*, a case in which "the district court rejects an argument that if accepted would terminate the proceeding is a 'natural' for appeal under 28 U.S.C. § 1292(b)...." The district court's rejection of the Director's contention that currency exchanges may not be debtors under the Bankruptcy Code falls squarely within this class of cases. If this contention had been accepted,

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[5] The Director sought to intervene in the turnover proceeding for the purpose of requesting dismissal of that proceeding. He was granted leave to do so, and obviously raises no challenge on appeal to this action by the bankruptcy court.

the chapter 11 petitions would have been dismissed for lack of jurisdiction. The district court believed that its order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." The district court's "magic words," however, did not invoke the appropriate response on the part of the Director. The Director failed to ask us within ten days of entry of the district court's order whether we agreed that the appeal should be decided immediately. 28 U.S.C. § 1292(b). We therefore need not decide the question left unanswered in *Riggsby:* whether section 1292(b) applies to bankruptcy cases.

The district court also suggested its order might be appealable under the "collateral order" doctrine, *Cohen*, 337 U.S. 541, which permits orders that "are not final in the sense of disposing of the entire lawsuit before the district court, but are final in the sense of irrevocably deciding the rights of a party, to be appealed under 28 U.S.C. section 1291." *In re UNR Industries, Inc.*, 725 F.2d 1111, 1117 (7th Cir. 1984). The doctrine applies to

> that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Cohen, 337 U.S. at 546. More recently, the Supreme Court found that, in order to be immediately appealable, "[t]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). This court has interpreted the last requirement articulated in *Coopers & Lybrand* to mean that the order's consequences "must be irreversible by subsequent proceedings." *In re UNR In-*

dustries, Inc., 725 F.2d at 1118 (citing *In re Continental Investment Corp.*, 637 F.2d 1, 5 (1st Cir. 1980)). In other words, denial of immediate review will cause the appellant "irreparable harm." *Id.* at 1117.

Although the orders at issue may satisfy the first two requirements, we conclude they cannot meet the third. The denial of a motion to dismiss, the limitation on intervention, and the appointment of a bankruptcy trustee are actions which, if erroneous, may be reversed on appeal[6] from the approval of a final plan of reorganization.[7]

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[6] That the denial of the motion to dismiss the chapter 11 petitions will *not* be reversed on appeal from the approval of a final plan of reorganization does not alter our *Cohen* analysis. The Director, who raised the same jurisdictional arguments in support of his motion to dismiss the chapter 11 petitions, the disposition of which is presently unappealable, and his motion to dismiss the turnover proceeding, the disposition of which is presently appealable, will be heard on the jurisdictional issue now and our decision on the turnover appeals therefore will be binding in any subsequent appeal by the Director from the denial of the motion to dismiss the chapter 11 petitions. The order denying the Director's motion to dismiss the chapter 11 petitions did not irrevocably decide the debtors' right to proceed in bankruptcy court. Rather, it is our holding in this appeal of the turnover decision that has the effect of foreclosing any possibility of the Director succeeding on the jurisdictional argument in a later appeal from the denial of the motion to dismiss the chapter 11 petitions.

[7] We see no reason why the Director would not have standing to appeal from a final plan of reorganization. The bankruptcy court allowed the Director to intervene in recognition of his legitimate interest in whether the debtors would be permitted to proceed in the bankruptcy court. And, the district court expanded the limited intervention rights given the Director by the bankruptcy court by ordering that the receiver and the trustee consult with the Director and consider any objections or suggestions he might have regarding the sale of the thirty-three Illinois currency exchanges.

Finally, the district court suggested that its order affirming the appointment of a bankruptcy trustee might be appealable under 28 U.S.C. § 1292(a)(2), which confers jurisdiction on the courts of appeals to entertain appeals from interlocutory orders "appointing receivers." Our research has revealed no cases in which an order appointing a bankruptcy trustee has been found to be appealable under section 1292(a)(2). In dicta, this court has stated that such an order is not appealable under that section. *In re Licek Potato Chip Co.*, 599 F.2d 181, 184 n.4 (7th Cir. 1979) (citing 7B MOORE'S FEDERAL PRACTICE ¶ 1292(a)(2) (2d ed. 1978); 2 COLLIER ON BANKRUPTCY ¶ 24.27 [2.1] at 762.1 n.7 (14th ed. 1978)). We think it clear that section 1292(a)(2) refers only to "federal equity receivers," and not to bankruptcy trustees. 7B MOORE'S FEDERAL PRACTICE ¶ 1292(a)(2) (2d ed. 1985); 7-Pt.2 MOORE'S FEDERAL PRACTICE ¶ 66.02 (2d ed. 1985).

In conclusion, the three orders entered in the context of the chapter 11 proceeding are not now appealable to this court. We proceed to the merits of the Director's appeal from the turnover order.

II.

Section 109 of the Bankruptcy Code, 11 U.S.C. § 109 (1982), provides that certain entities may not be debtors under the Code. Section 109(b)(2) provides that:

> (b) A person may be a debtor under chapter 7 of this title only if such person is not—
>
> (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)).

"Only a person that may be a debtor under chapter 7 of this title ... may be a debtor under chapter 11 of this title." 11 U.S.C. § 109(d). A "person" is defined as an individual, a partnership, or a corporation. 11 U.S.C. § 101(33).

The Director argues that the Illinois exchanges, which provide financial services and are regulated by the state in a manner "substantially identical to those entities listed in section 109(b)(2)," cannot be debtors under chapter 11. Applying two well-established tests for determining whether an entity is prohibited from being a debtor under the Code, the state classification test and the independent classification test, *see* 2 KING, COLLIER ON BANKRUPTCY § 109.02 15th ed. 1985), the district court rejected the Director's contention. We turn to an examination and application of these tests to community currency exchanges.

A.

The state classification test involves examination of the entity's status under the law of the state of incorporation. If state law classifies the entity as one that is specifically excluded from being a debtor under section 109(b)(2), the inquiry generally ends there. If state law does not so classify the entity, the question becomes whether the entity is the substantial equivalent of those in the excluded class. The starting point in this analysis is a comparison of the powers conferred upon or withheld from the entity with the powers conferred upon or withheld from entities excluded under section 109(b)(2). The court also will examine the relevant statute to determine whether the entity, like those in the excluded class, is subject to extensive state regulation; is subject to express statutory procedures for liquidation or rehabilitation; and conducts business of a public or quasi-public nature. *See First American Bank & Trust Co. v. George*, 540 F.2d 343, 349 (8th Cir.), *cert. denied*, 429 U.S. 1011 (1976), and cases cited therein. The Director would have us equate currency

exchanges with banks and credit unions. Not surprisingly, he focuses on the powers these entities share.

The formation and operation of Illinois state banks are governed by the Illinois Banking Act, Ill. Rev. Stat. ch. 17, §§ 301-394. Section 309 of this act, entitled "Formation and primary powers," provides that:

> It shall be lawful to form banks, as herein provided, for the purpose of discount and deposit, buying and selling exchange and doing a general banking business . . .; and such banks shall have the power to loan money on personal and real estate security and to accept and execute trusts. . . .

The Illinois Supreme Court has acknowledged that the primary powers of a bank are to lend money, discount notes, receive deposits, and deal in commercial exchange. *Knass v. Madison & Kedzie State Bank*, 354 Ill. 554, 563, 188 N.E. 836, 840 (1934). Under Illinois law, savings and loan associations and credit unions also may receive deposits and lend money. *See* Savings and Loan Act, Ill. Rev. Stat. ch. 17, §§ 3001-3293; Credit Union Act, Ill. Rev. Stat. ch. 17, §§ 4401-4471.

Community currency exchanges are governed by the provisions of the Community Currency Exchange Act, Ill. Rev. Stat. ch. 17, §§ 4802-4852. A community currency exchange is defined as

> [a]ny person, firm, association, partnership or corporation . . . engaged in the business or service of, and providing facilities for, cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders . . ., or engaged in both such businesses, or engaged in performing any one or more of the foregoing services.

Ill. Rev. Stat. ch. 17, § 4802. State and national banks are specifically excepted from this definition. *Id.*

Section 4804, entitled "Powers of community currency exchanges," provides, in pertinent part, that no exchange

> shall be permitted to accept money or evidences of money as a deposit to be returned to the depositor or upon the depositor's order [or] to act as bailee or agent for persons, firms, partnerships, associations or corporations to hold money or evidences thereof or the proceeds therefrom for the use and benefit of the owners thereof, and deliver such money or proceeds of evidence of money upon request and direction of such owner or owners.

The Act, then, grants exchanges the authority to cash checks and sell or issue money orders, services that also are rendered by banks. Of key importance, however, is the Act's express prohibition on the acceptance of deposits by currency exchanges.[8] The Director would have us equate currency exchanges with banks and credit unions because they perform two essential services that banks and credit unions do: the cashing of checks and the issuance of money orders. That an entity is empowered to render some of the services provided by a bank has been held to be insufficient to sustain a finding that the entity is the substantial equivalent of a bank.

In the seminal case of *Gamble v. Daniel*, 39 F.2d 447 (8th Cir. 1930), the court provided the following general-

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[8] Although the Act does not expressly prohibit exchanges from lending money or otherwise extending credit, it does not authorize exchanges to perform these services either. Notably, all other financial institutions which have the authority to do so are expressly granted that authority by statute. See Illinois Banking Act, Ill. Rev. Stat. ch. 17, § 309; Savings and Loan Act, Ill. Rev. Stat. ch. 17, § 3121; Credit Union Act, Ill. Rev. Stat. ch. 17, § 4414.

ized interpretation of the term "banking corporation" under section 4 of the Bankruptcy Act:[9]

> [In 1910, at the time of the adoption of the "banking corporation" exception], the ordinary conception of a bank was of a business which was based primarily on the receipt of deposits (general or special), which deposits were used by the bank for loans, discounts, buying and selling commercial paper, and other business purposes.... The prime incentive in engaging in the business was the profit to be made, directly or indirectly, from the use of deposits. Most of the then existing state legislation concerning banks had as its principal purpose the protection of such depositors. Much of the right to regulate banks was the public interest in protecting depositors. Banking has been a development, and the above was its status in 1910. Other businesses might and did, and still do, deal in commercial paper, make loans or borrow money without any one thinking of them as banks. When a business takes deposits and then does the above or related things, every one knows it is doing a banking business. * * * *In short, while there may be other attributes which a bank may possess, yet a necessary one is the receipt of deposits which it may use in its business.*

Id. at 450-51 (emphasis added). Although the trust company, whose status was the subject of debate in *Gamble*, had most of the powers usually exercised by a bank, it was prohibited from accepting deposits. The court held the trust company was not a "banking corporation" and could be a debtor under the Bankruptcy Act.

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[9] Although the term "banking corporation" has been replaced in 11 U.S.C. § 109(b)(2) with a list of specific entities, cases decided under section 4 are clearly relevant to an understanding of the congressional policy underlying the exclusion. Additionally, we rely upon these cases because our research has revealed no cases presenting the question whether a particular entity is the equivalent of one of the banking institutions now listed in section 109(b)(2).

The same result was reached in *In re Prudence Co.*, 79 F.2d 77 (2d Cir.), *cert. denied*, 296 U.S. 646 (1935). In that case, the directors of an investment company asserted the right to file a petition in bankruptcy. The state superintendent of banks, who had appointed a receiver and taken possession of the company's property, argued that the company was the substantial equivalent of a bank because the state, in permitting it to be incorporated under state banking law, so classified it; because it was subject to the supervision of the superintendent of banks; and because state law provided a procedure for its liquidation. Determinative of the issue was the company's lack of authority to receive deposits. The court held it was not a banking corporation within the meaning of section 4 of the Bankruptcy Act.

That the power to accept deposits which are used in the entity's business is the essential attribute of a banking corporation recently was reaffirmed by the Eighth Circuit in *First American Bank & Trust Co. v. George*, 540 F.2d 343. Under state law, the corporation had the authority to receive savings deposits. That it could not undertake demand deposits distinguished it from state banking associations, but did not compel the conclusion that it was not a "banking corporation" within the meaning of section 4 of the Bankruptcy Act.

Our conclusion that a currency exchange is not the substantial equivalent of a bank is supported by *McDougall v. Lueder*, 389 Ill. 141, 58 N.E.2d 899 (1945), in which the Illinois Supreme Court entertained, *inter alia*, an equal protection challenge to the provision of section 3 of the Community Currency Exchange Act of 1943 that prohibits the acceptance of deposits by exchanges. The Court found the provision to be a reasonable regulation:

> To allow the currency exchanges to engage in such activities would be to allow them to engage in the banking business without the regulations and responsibilities attendant thereupon.

389 Ill. at 151-52. Thus, the Illinois Supreme Court itself has acknowledged that because a currency exchange lacks the authority to accept deposits, it does not do a banking business.

True, currency exchanges are licensed and regulated by the state and there are express statutory provisions for their liquidation. Section 4825 of the Currency Exchange Act allows the Director to appoint a receiver to handle claims against an exchange if the Director determines that the licensee is insolvent or is violating the Act. The receiver may operate the exchange until the Director determines possession should be restored to the licensee or that the business should be liquidated. Section 4826 provides for liquidation under court supervision. Sections 4827, 4829 and 4830 provide for payment of dividends upon money collected by the receiver, the disposition of actions pending against an exchange, and the disposition of the books and records of the receivership. Section 4828 outlines the powers of the receiver.

The district court compared these six sections of the Currency Exchange Act addressing liquidation with the expansive liquidation and dissolution provisions of the Illinois Banking Act, the Illinois Savings and Loan Act, and the Illinois Insurance Code, and concluded that the "stark contrast" between the skeletal liquidation scheme for currency exchanges and the comprehensive schemes for the other institutions indicated that the Illinois legislature did not view currency exchanges and the banking institutions excluded by section 109(b)(2) as substantially equivalent entities. The Director, who takes exception to any test that merely counts the number of statutory provisions addressing liquidation, notes that only one statutory provision governs the liquidation of credit unions, *see* Ill. Rev. Stat. ch. 17, § 4463, which are among the institutions expressly excluded from bankruptcy under section 109(b)(2).

The district court's approach was not improper. The more comprehensive the liquidation scheme, the stronger

the indication that the state sees a strong public interest in direct governmental supervision and control of the liquidation or dissolution of the institution. After comparing and contrasting the liquidation schemes provided for these institutions by state law,[10] we agree with the district court's assessment that the Illinois legislature did not view currency exchanges as the substantial equivalents of the other entities. The Director's reference to the single provision for the liquidation of credit unions does not alter our conclusion; rather, the Director has unwittingly made our next point. Under the state classification test, the provision of a statutory scheme for an entity's liquidation never has been deemed to be sufficient to classify that entity as one excluded under section 109(b)(2). *See, e.g., In re Prudence*, 79 F.2d at 79. The touchstone of the test is the power to accept deposits, a statutorily-conferred authority that credit unions share with the other excluded entities.

Our observation also applies to the last relevant inquiry: whether the entity is involved in a business of a public or quasi-public nature. This characteristic is found in conjunction with extensive state regulation and extensive liquidation procedures. We recognize that the activities of currency exchanges affect the public interest, particularly because currency exchanges provide vital services to communities in which banks are sparse. Because this is so, the Illinois legislature has declared that "[i]t is in the public interest to promote and foster the community currency exchange business and to insure the financial stability thereof." Ill. Rev. Stat. ch. 17, § 4809. This public interest is protected by the licensing, insurance, and bonding requirements of the Act. The liquidation procedures of the Act, however, speak only of protection of the rights of creditors. *See* Ill. Rev. Stat. ch. 17 §§ 4825-4830. The public interest in ensuring that currency

[10] *Compare* Ill. Rev. Stat. ch. 17 §§ 4825-4830 *with* Ill. Rev. Stat. ch. 17, §§ 362-386 *and* Ill. Rev. Stat. ch. 17, §§ 3221-3267 *and* Ill. Rev. Stat. ch. 73, §§ 799-833.

exchanges remain financially stable and therefore capable of servicing the community is not vindicated by the liquidation provisions of the Act. In contrast, states provide comprehensive supervision and liquidation schemes for entities excluded under section 109(b)(2) largely "in order to protect the millions of persons who deal with them on the faith of the protection afforded by direct governmental supervision and control." *Woolsey v. Security Trust Co.*, 74 F.2d 334, 337 (5th Cir. 1934). The state's overriding concern is with protection of the depositors, and comprehensive liquidation schemes are designed to afford this protection. Although public funds may be at risk when a currency exchange becomes insolvent, protection of these funds is not the primary goal of the Act's liquidation scheme. We find that permitting currency exchanges to seek relief under the Bankruptcy Code does not violate the public interest.

In conclusion, under the state classification test, a currency exchange is not the substantial equivalent of the excluded entities.

B.

Applying the independent classification test, under which the court construes section 109(b)(2) itself, the district court found that currency exchanges do not fall within its exclusionary language. Our construction of that section leads us to agree. The entities excluded from being debtors under the Code are specifically enumerated. The general rule of statutory construction is that the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded. *Expressio unius est exclusio alterius.* 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (1973 & Supp. 1983).[11] If Congress had intended to

[11] As debtors point out, we may presume that Congress was aware of the existence of currency exchanges when it enacted the Code. From Congress' failure to include them in section 109(b)(2) we may infer its intent to make them eligible for bankruptcy relief.

make the list of excluded entities illustrative rather than exhaustive, it could have used the rule of statutory construction found in the Bankruptcy Code which provides that the words " 'includes' and 'including' are not limiting." 11 U.S.C. § 102(3). Because Congress chose not to do so, we conclude that the list of excluded entities is intended to be exhaustive.

The term "banking corporation" in section 4(a) of the Bankruptcy Act was replaced with a list of the specific types of financial institutions excluded from seeking relief under the Bankruptcy Code. The legislative history of section 109(b)(2) indicates that the "banking corporation" exclusion was expanded in light of changes in the banking laws. H.R. Rep. No. 595, 95th Cong., 1st Sess. 318-19 (1977). Nevertheless, it seems clear that the expansion was not intended to bring those institutions which do not do a banking business within the ambit of the exclusion. The institutions listed all accept deposits, the essential function of a banking institution. Currency exchanges do not do a banking business, and we find no basis for implicitly including them in a list of excluded institutions that purports to be exhaustive.

We hold that currency exchanges are not precluded from seeking bankruptcy relief by section 109(b)(2).

III.

The Director launches a final attack on the jurisdiction of the bankruptcy court based upon the state law governing administrative receiverships. The cases he cites establish that, under Illinois law, administrative receivers have exclusive custody of and title to all assets of the entity placed under receivership, including causes of action. *People ex rel. Knight v. O'Brien*, 40 Ill. 2d 354, 240 N.E.2d 686 (1969) (administrative receivership created under authority of Illinois Savings and Loan Act); *McIlvaine v. City National Bank & Trust Co.*, 314 Ill. App. 496, 42 N.E.2d 93 (1942) (administrative receivership created under authority of Illinois Banking Act); *People ex*

rel. Palmer v. Niehaus, 356 Ill. 104, 190 N.E. 349 (1934) (administrative receivership created under authority of Illinois Insurance Liquidation Act). For example, it was held in *McIlvaine* that a stockholder of the bank was precluded from bringing a derivative suit in the name of the bank because the bank's rights were vested exclusively in the receiver. The Director contends that, by parity of reasoning, the exchanges were precluded from filing the chapter 11 petitions because all causes of action vested exclusively in his receiver.

The district court held, and we agree, that the exclusivity of an administrative receiver's title to all assets under state law is irrelevant to the determination whether a particular entity may file for bankruptcy relief. As the Director concedes, a corporation may not be precluded by state law from availing itself of federal bankruptcy law. *International Shoe Co. v. Pinkus*, 278 U.S. 261 (1929). Title 11 suspends the operation of state insolvency laws except as to those classes of persons specifically excluded from being debtors under the Code. The Director's contention that the exchanges are not "ordinary corporations," but rather "special corporations whose very existence depended upon licensing by the State of Illinois" does not alter our conclusion that the receiver's exclusive title to the assets did not preclude the filing of the petitions. He is simply rephrasing the argument, which we have already rejected, that currency exchanges are akin to those entities which are precluded from being debtors under 11 U.S.C. § 109(b)(2).

Moreover, the Director's argument ignores Congress' recognition that a third party may have taken possession, custody, or control of the debtor's assets prior to the filing of a bankruptcy petition. If such party is a custodian within the meaning of 11 U.S.C. § 101(10), it must turn

over the property of the debtor to the bankruptcy trustee. 11 U.S.C. § 543(b)(1).[12]

The Director contends that the district court erred in finding that his receiver is a custodian within the meaning of section 101(10) of the Bankruptcy Code, 11 U.S.C. § 101(10). A custodian includes a(n)

> (A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;
>
> (B) assignee under a general assignment for the benefit of the debtor's creditors; or
>
> (C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

The legislative history of section 101(10) indicates that Congress intended the term "custodian" to encompass a variety of prepetition agents who had taken charge of the debtor's assets. For example, the Senate Report provides:

> There is no similar definition in current law. It is defined to facilitate drafting, and means a prepetition liquidator of the debtor's property, such as an

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[12] Section 543(b) provides that the custodian shall—

> (1) deliver to the trustee any property of the debtor transferred to such custodian, or proceeds of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case;
>
> (2) file an accounting of any property of the debtor, or proceeds of such property, that, at any time, came into the possession, custody, or control of such custodian.

> assignee for the benefit of creditors, a receiver of the debtor's property, or administrator of the debtor's property. The definition of custodian to include a receiver or trustee is descriptive, and not meant to be limited to court officers with those titles. The definition is intended to include other officers of the court if their functions are substantially similar to those of a receiver or trustee.

S. Rep. No. 989, 95th Cong., 2d Sess. 23 (1978).

The Director seizes upon this portion of the legislative history to argue that the term "custodian" encompasses only court-appointed receivers and not administrative receivers. In light of the unrestrictive language used in this definition, that Congress did not refer specifically to administrative receivers in the legislative history is not, in our view, indicative of its intent to exclude them. As the legislative history illustrates, the categories of custodians are descriptive rather than exhaustive. Congress defined the term broadly to include third parties who have taken charge of the debtor's assets for the general benefit of creditors. *See, e.g., In re Pride Foods, Inc.*, 22 B.R. 356 (Bankr. D. Neb. 1982); *In re Lewis*, 12 B.R. 106 (Bankr. D. Ga. 1981). The Director's receiver falls within this broad class of prepetition liquidators.

We fail to understand how the fact that the Director's receiver—as distinguished from a court-appointed receiver—holds title to the exchanges' assets undermines our conclusion. We find no indication that Congress intended to limit the term "custodian" to those prepetition liquidators who merely hold the debtor's property. Indeed, the legislative history of section 543 supports the conclusion that the term "custodian" includes prepetition liquidators who hold title to the debtor's assets.

Under section 543(a) of the Bankruptcy Code, 11 U.S.C. § 543(a),

> [a] custodian with knowledge of the commencement of a case under this title concerning the debtor may

> not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

The legislative history of this section provides, in pertinent part, that:

> This section requires a custodian appointed before the bankruptcy case to deliver to the trustee and to account for property that has come into his possession, custody, or control as a custodian. *"Property of the debtor" in section (a) includes property that was property of the debtor at the time the custodian took the property, but the title to which passed to the custodian.*

H. R. Rep. No. 595, 95th Cong., 1st Sess. 370 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 84 (1978) (emphasis added).

This clear indication of Congressional intent also disposes of the Director's contention that because his receiver became vested with title to the assets of the exchanges pursuant to section 15.1 of the Currency Exchange Act, the assets could not be deemed property of the debtor for the purpose of turnover pursuant to section 543.[13]

The Director cites *In re Teltronics, Ltd.*, 649 F.2d 1236 (7th Cir. 1981), for the broad proposition that the bankruptcy court had no authority to order the turnover because the assets of the debtors became the property of his receiver. We find the Director's reliance on *In re Teltronics* totally misplaced. The issue presented in that

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[13] A receiver appointed under section 15.1 of the Community Currency Exchange Act is vested with title to the exchange's assets solely for the purpose of effecting the liquidation. The licensee retains its ownership interest in the assets and is entitled to any surplus after creditors are paid. That interest is "property of the estate" under section 541(a) of the Code.

case was whether money held by a state court receiver under the authority of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. ch. 121 1/2, § 261 *et seq.*, was property of the bankruptcy estate and thus subject to turnover to the bankruptcy trustee. This court's holding that the property in issue was not part of the bankruptcy estate turned not on any conclusion that upon initiation of the receivership the debtor's assets became property of the receiver which could never be part of the bankruptcy estate, but upon the well-established rule that property obtained by the bankrupt by fraud is not part of the bankruptcy estate. The Director has made no such argument here.

IV.

The Director's final challenges to the bankruptcy proceedings are that they should have been stayed or, alternatively, that the bankruptcy court should have abstained. We address these contentions in turn.

The Director seeks to invoke an exception to the automatic stay provisions of section 362 of the Code. Under section 362, the filing of a bankruptcy petition operates, with certain enumerated exceptions, as a stay of all judicial and non-judicial proceedings against the debtor or his property. Under section 362(b)(4), "[t]he commencement or continuation of an action or proceeding by a governmental unit to enforce [its] police or regulatory power" will not be stayed. The Director contends that liquidation proceedings under the Currency Exchange Act fall within this exception.

The legislative history assists in determining the scope of the exception contained in section 362(b)(4):

> Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.

S. Rep. No. 989, 95th Cong., 2d Sess. 52 (1978).

This exception has been narrowly construed to apply to the enforcement of state laws affecting health, welfare, morals and safety, but not to "regulatory laws that directly conflict with the control of the *res* or property by the bankruptcy court." *State of Missouri v. United States Bankruptcy Court*, 647 F.2d 768, 776 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982). Thus, in *State of Missouri*, the court held the exception inapplicable to state liquidation proceedings involving insolvent grain warehouses, stating that

> [M]issouri's grain laws, although regulatory in nature, primarily relate to the protection of the pecuniary interest in the debtors' property and not to matters of public safety and health. Missouri's laws, by governing the operation and liquidation of grain warehouses, directly conflict with the control of the property by the bankruptcy court and, therefore, do not fall within the section 362(b)(4) exception.

Id.

So too the liquidation provisions of the Community Currency Exchange Act are designed to protect the rights of creditors. And, the liquidation procedures, by vesting control of the debtors' property in the receiver, "directly conflict with the control of the property by the bankruptcy court." We hold that the state proceedings at issue here do not fall within the ambit of the section 362(b)(4) exception.

In re Shippers Interstate Service, Inc., 618 F.2d 9 (7th Cir. 1980), cited by the Director for the broad proposition that persons subject to regulatory enforcement proceedings should not be permitted to seek the sanctuary of bankruptcy court, supports rather than undermines our conclusion. The issue presented in that case was whether the automatic stay rule promulgated under chapter XI of the Bankruptcy Act of 1898 applied to unfair labor practice proceedings instituted by the National Labor Rela-

tions Board. Noting that the regulatory proceedings at issue did not threaten the assets of the estate, this court held that the automatic stay rule did not apply.

The Director also seeks review of the bankruptcy court's decision not to abstain from entertaining the chapter 11 petitions pursuant to 11 U.S.C. § 305. Section 305(a)(1) provides that:

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
>
> (1) the interests of creditors and the debtor would be better served by such dismissal or suspension.

Of particular relevance is section 305(c), which provides that an order under subsection (a) dismissing or suspending the proceedings or refusing to do either "is not reviewable by appeal or otherwise." Despite this provision, the district court addressed the Director's argument that the bankruptcy court should have abstained, concluding that review of an abstention order is proper "where, as here, the appeal raises a jurisdictional issue." *In re Cash Currency Exchange, Inc.*, 37 B.R. at 629 n.12. This court has found the statutory prohibition of appellate review of abstention decisions to be "clear and, therefore, conclusive." *In re Covey*, 650 F.2d 877, 880 (7th Cir. 1981). No exceptions to the prohibition were provided by Congress. Even if this court were to sanction the judicial creation of exceptions to this rule, which we do not, the one created by the district court must fail. Implicit in the absention provision, which assumes the bankruptcy court has jurisdiction of the case, is recognition that there are cases in which it may be appropriate for the court to decline to exercise its jurisdiction. The Director appropriately challenged the bankruptcy court's jurisdiction via motions to dismiss. Once that court determined it had jurisdiction, the decision whether to abstain became an unreviewable exercise of discretion.

Finally, the Director contends that liquidation proceedings under the Act are the type of specialized,

ongoing state regulatory proceedings protected from federal court interference under the abstention doctrine of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Involved in *Burford* was a state's complex oil conservation scheme. Questions arising under that comprehensive administrative scheme were adjudicated by a specialized tribunal which was charged with the responsibility of establishing a coherent policy on the conservation of the state's major resource, a matter of substantial public concern. In challenging an administrative decision to grant an oil-drilling permit, Sun Oil attacked the state policy expressed in that decision. Noting that "conflicts in the interpretation of state law, dangerous to the success of state policies, [were] almost certain to result from the intervention of the lower federal courts," *id* at 334, the Court found abstention appropriate.

The Director primarily relies upon *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980), a suit by a retired employee of an insurance company against the state superintendent of insurance, who was liquidating the company pursuant to state law. The retiree challenged, as a violation of ERISA, the liquidator's decision to terminate his retirement benefits. The court held that, under the authority of *Burford*, the retiree's claim that the superintendent violated the terms of the employee welfare fund should have been left to the state courts for determination. The factors found to be determinative of the abstention issue were the state's complex administrative and judicial system for regulating and liquidating domestic insurance companies; the superintendent's expertise; the congressional mandate, expressed in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, that state regulation of the insurance industry be free from federal interference; and the disruption of the orderly and efficient distribution of assets to claimants that might be occasioned by federal court interference.

Levy provides little support for the Director's position. Insurance companies are among those entities precluded from being debtors under the Code because Congress has determined not to interfere with the state's com-

prehensive liquidation scheme. In light of this, abstention from the exercise of federal court jurisdiction, as in *Levy*, over claims arising out of such state liquidation proceedings is particularly appropriate. We have determined that currency exchanges may be debtors under the Code. In effect, we have found no federal policy of noninterference with the state's scheme for liquidating currency exchanges. Because of the paramountcy of federal bankruptcy law, the policies underlying the abstention doctrine have little or no force in a case in which a proper debtor pursues his right to seek relief under the Code. The bankruptcy court correctly refused to abstain.

V.

In conclusion, we reject the Director's contention that the thirty-three Illinois currency exchanges are precluded from seeking relief under the Code. The bankruptcy court has jurisdiction of the case and properly ordered the Director's receiver to turn over debtor's property to the bankruptcy trustee.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge, Honorable John A. Nordberg

Cause No. 83 C 2640, 2641, 3015, 3016, 3017, 3021 (83 B 1933 through 83 B 1989) (83 A 0499)

Date: Jan. 27, 1984

Title of Cause: In Re: Cash Currency Exchange, Inc., et al. Debtors
Cash Currency Exchange, Inc. et al. v. Donald C. Shine

Brief Statement of Motion: Memorandum Opinion And Order

* * *

Enter memorandum opinion and order. (Draft) The orders of the bankruptcy court in the above-captioned appeals are affirmed.

/s/ Nordberg, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:
CASH CURRENCY EXCHANGE, INC., et al.,

Debtors,

CASH CURRENCY EXCHANGE, INC., et al.,

Plaintiffs,

v.

DONALD C. SHINE, Receiver,

Defendant.

Appeals 83 C 2640, 83 C 2641, 83 C 3015, 83 C 3016, 83 C 3017, and 83 C 3021 from the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division.
(83 B 1933 through 83 B 1989) (83 A 0499)
Judge John A. Nordberg

MEMORANDUM OPINION AND ORDER

The primary issue in this case is whether a currency exchange can be a debtor under Chapter 11 of the Bankruptcy Reform Act of 1978 ("Bankruptcy Code"). On February 10, 1983, 57 currency exchange corporations filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code. Thirty-three of these currency exchanges were located in Illinois. A week prior to the filing of these bankruptcy petitions, the 33 Illinois exchanges had been placed under administrative receiverships pursuant to the Illinois Community Currency Exchanges Act, Ill. Rev. Stat. ch. 17 §4801-4852 (1981)

("Act"). The Director also had filed 33 separate injunction actions to liquidate the exchanges pursuant to the Act. The Act regulates the operation of currency exchanges in Illinois, setting forth licensing, bonding and insurance requirements. The Illinois Director of Financial Institutions ("Director") is authorized to issue licenses to applicants and generally administer the various provisions of the Act. If the Director determines that any licensee is insolvent or is violating the Act, the Director is authorized to appoint a receiver to take possession and title to the books, records and assets of the exchange. *Id.* at §4825. The receiver may operate the exchange until the Director determines that possession should be restored to the licensee or that the business should be liquidated. *Id.* at §§4825 & 4826. Until possession of a currency exchange is turned back to the licensee or until a liquidation proceeding is complete, the Director or the Director's receiver controls the exchange's assets.

In the instant case, the Director's receiver was in control of the 33 currency exchanges when the exchanges filed Chapter 11 petitions. The debtor-exchanges therefore sought an order requiring the Director's receiver to turn over the property of the exchanges to the bankruptcy trustee. The Director sought and was granted leave to intervene in these turnover proceedings and the 33 Chapter 11 petitions, although on a limited basis. The bankruptcy court subsequently ordered the Director's receiver to turn over the property of the exchanges to the bankruptcy trustee and denied the Director's motion to dismiss the 33 Chapter 11 petitions. The Director appeals from these orders to this court.[1]

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[1] Specifically the Director appeals from three orders entered within the Chapter 11 proceedings and three orders entered within

(Footnote continued on following page)

The thrust of the Director's argument focuses on §109 of the Bankruptcy Code.[2] Section 109 of the Bankruptcy

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[1] *continued*
the adversary proceeding applying for turnover of property of the estates to the bankruptcy court:

> *83 C 2640* Appeal from the order dated 2-18-83 entitled Order for Appointment of Trustee; *83 C 2641* Appeal from the order dated 2-18-83 limiting intervention in the Chapter 11 petitions on the terms set forth in the record on 2-18-83; *83 C 3021* Appeal from the order dated 2-18-83 denying the Director's Motion to Dismiss Certain Chapter 11 Petitions and In the Alternative to Abstain.
>
> *83 C 3015* Appeal from the order dated 2-18-83 limiting intervention in the adversary proceeding entitled Application on the terms set forth in the record on 2-18-83; *83 C 3016* Appeal from the order dated 2-23-83 entitled Order for Turnover; *83 C 3017* Appeal from the order dated 2-18-83 denying the Director's Motion to Strike and Dismiss Adversary Proceeding Entitled Application to Compel Custodian to Turnover Property Of The Estate.

[2] Pointing to *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. ____, 102 S.Ct. 2858 (1982), which found constitutional infirmities in the Bankruptcy Code's jurisdictional provisions, the Director also argues that the bankruptcy court did not have jurisdiction over the 33 Chapter 11 petitions. This contention must be rejected. Under *Lear Colorprint Corp. v. Enco Manufacturing Co.*, 82 B 10233, slip op. (N.D. Ill. Apr. 19, 1983), district courts have jurisdiction under 28 U.S.C. §1334. On December 20, 1982 the District Court for the Northern District of Illinois adopted a General Order, referring bankruptcy matters to bankruptcy judges of the district. This court finds that the bankruptcy court's jurisdiction is proper under *Lear* and the General Order of December 20, 1982. 28 U.S.C. §1334 gives federal courts original jurisdiction of all matters and proceedings in bankruptcy. This jurisdictional grant remains effective during the transitional period before the scheduled establishment of the new bankruptcy courts under the Bankruptcy Reform Act of 1978. §§404 & 405 of the Bankruptcy Reform Act of 1978. Although *Northern Pipeline* found constitutional infirmities in the new bankruptcy courts, 28 U.S.C. §1334 still remains in effect and thus federal jurisdiction over bankruptcy matters also remains viable. This jurisdiction was properly delegated to the bankruptcy courts by the Gen-

(Footnote continued on following page)

Code defines who may be a debtor under the various chapters of the Code, 7, 9, 11 and 13. The section states, in relevant part.

> (b) A person may be a debtor under chapter 7 of this title only if such person is not—
>
> 1. a railroad;
>
> 2. a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union; or
>
> 3. a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.
>
> * * *
>
> (d) Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under Chapter 11 of this title.

The Director maintains that currency exchanges perform financial services and are regulated by the state of Illinois in a manner substantially equivalent to those entities listed in §109(b)(2). Because of these similarities between the banks and banking institutions listed in §109(b)(2) and currency exchanges, the Director concludes that currency exchanges are within the purpose of §109(b)(2) and cannot be debtors under chapters 7 or 11 of the Bankruptcy

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[2] *continued*
eral Order of December 20, 1983 for the Northern District of Illinois. *See In re UNR Industries, Inc.*, No. 83-1746, slip op. at 5 (7th Cir. Jan. 17, 1984). *See also In re Northland Point Partners*, No. 82-05387-W (E.D. Mich. Feb. 8, 1983).

Code. After examining relevant cases and carefully weighing the arguments presented, this court concludes that a currency exchange does not fall within §109(b)(2) and may be debtor in a Chapter 11 proceeding.

DETERMINING WHAT ENTITIES ARE EXCLUDED UNDER §109(b)(2)

In determining whether a particular corporation is an excluded corporation under §109(b)(2), courts have used two approaches: (1) a state classification based upon the law of the state of incorporation, and (2) an independent classification test based upon the court's own construction of the Bankruptcy Code. 2 King, Klee, Levin, Miller and Murphy, Collier on Bankruptcy §109.02 (1983). [hereinafter cited as Collier's 15th ed. 1983].

Under the state classification test, the court determines the corporation's status by examining the law of the state of incorporation. If the state statute denominates the corporation as one which the Bankruptcy Code excludes, the corporation cannot be a debtor under the Bankruptcy Code.[3] If the statute is not definitive, the court will more closely examine the substance of the statute, especially the powers given the corporation under the statutory scheme. In some instances, a comprehensive statutory liquidation scheme may indicate that the corporation is to be excluded from the reach of the Bankruptcy Code, although statutory provision for state supervised liquidation does not necessarily bring a corporation within the

[3] Although the state classification test is more favored by courts, this does not mean that state law is followed literally without regard for the real activities of the corporation. 2 Collier's 15th ed. 1983 §109.02.

exclusionary language of §109. *Id.* If an examination of the state statute indicates that the state does not equate the corporation in question with corporations in the excluded class, the corporation is a proper debtor.

Under the second, independent classification test, the court defines the words of the bankruptcy statute itself and then determines if the corporation in question falls within the defined words. Cases employing the independent classification test have utilized a common sense approach, guided by legislative history and rules of statutory construction. *In re Prudence,* 79 F.2d 77, 79 (2d Cir. 1938); *State of Kansas ex rel. Boyton v. Hayes,* 62 F.2d 597, 598 (10th Cir. 1932); *Gamble v. Daniel,* 39 F.2d 447, 450 (8th Cir. 1930).

In the instant case, applying either test, the entities in question do not fall within the §109(b)(2) exclusion and are therefore proper debtors in a Chapter 11 proceeding. Under the state classification test, currency exchanges are not defined as banking institutions nor are they so similar to banking institutions as to fall within the exclusionary language of §109(b)(2). Currency exchanges possess very different and more limited powers under the Currency Exchanges Act than banks and banking institutions possess under the Illinois Banking Act, Ill. Rev. Stat. ch. 17 §§301-394 (1981) (Illinois Banking Act). In addition, the statutory liquidation provisions governing currency exchanges are more meager and limited than the comprehensive liquidation provisions governing banks and banking institutions. All these factors indicate that the state of Illinois does not classify currency exchanges as banking institutions or their substantial equivalent. Similarly, under the independent classification test, the words of the Bankruptcy Code itself do not indicate that Congress intended to include in §109(b)(2) entities which function like the Illinois currency exchanges at issue herein.

State Classification Test

Applying the state classification test, several circuits have refused to find that a particular entity fell within §109(b)(2)'s exclusion because the entity rendered some services similar to the services rendered by a bank. In *Gamble v. Daniel*, 39 F.2d 447 (8th Cir. 1930), for example, the state of Nebraska argued that a trust company was a banking corporation and thus excluded from being a debtor under the bankruptcy law.[4] Under Nebraska law, the trust company was empowered to do several of the essential and usual things that banks could do. The court found that simply because the trust company and banks carried out similar activities, the trust company did not become a banking corporation under state law. The court looked to the state statute defining and regulating banks and found that deposits were an integral part of the business of banks; under state law banks were authorized to receive deposits, required to hold cash reserves based upon deposits, interest payable on deposits was specified, guaranty funds for depositors were specified and reports regarding deposits were required. Although the statute defining and regulating trust companies authorized a trust company to carry on many functions performed by banks, a trust company was not permitted to receive deposits in a banking sense. Therefore, the court concluded that the trust companies in question were not banking institutions under the state statute. The court affirmed the bankruptcy court's order requiring state officers charged with liquidating the trust company to turn over the property of the trust company to the receiver appointed by the

[4] Cases decided under the prior Bankruptcy Act of 1898 are applicable to proceedings under the new Bankruptcy Code unless the legislative history of the new Bankruptcy Code indicates otherwise.

bankruptcy court. *Accord In re Prudence*, 79 F.2d 77, 79 (2d Cir. 1938).

In the instant case, as in *Gamble*, the currency exchanges in question are not empowered to receive deposits as are the state banks organized under the Illinois Banking Act. The Illinois Banking Act, in the section entitled "Formation and primary powers," provides:

> 3. It shall be lawful to form banks, as herein provided, for the purpose of discount and deposit, buying and selling exchange and doing a general banking business, excepting the issuing of bills to circulate as money; and such banks shall have the power to loan money on personal and real estate security, and to accept and execute trusts, and shall be subject to all of the provisions of this Act.

Id. at §309. The Banking Act thus specifies that the primary powers of a bank are to receive deposits and loan money. *See also Knass v. Madison*, 354 Ill. 554, 188 N.E. 836 (1934). Moreover, other banking institutions regulated by the Illinois Banking Act, namely savings and loan associations and credit unions[5], are also empowered to receive deposits and loan money. *See* Savings and Loan Act Ill. Rev. Stat. ch. 17 §§3001-3293 (1981); Credit Union Act, Ill. Rev. Stat. ch. 17 §§4401-4471 (1981).

In contrast, the Community Currency Exchanges Act, Ill. Rev. Stat. ch. 17 §4802-4852 (1981), defines a currency exchange as an entity:

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[5] The state points out that the Financial Institutions Code, Ill. Rev. Stat. ch. 17 §104 (1981), includes currency exchanges and credit unions within the definition of the term "financial institutions". The state argues that since the two terms are similarly defined and credit unions are explicitly excluded from the Bankruptcy Code, that currency exchanges must also be excluded from bankruptcy. This argument overlooks the fact that credit unions may receive deposits while currency exchanges cannot.

> [E]ngaged in the business or service of, and providing facilities, for cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other consideration, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services.

Id. at §4802. In describing the powers of a currency exchange, the Act specifically prohibits an exchange from accepting deposits to be returned to the depositor or upon the depositor's order:

> Powers of community currency exchanges
>
> §3. No community or ambulatory currency exchange shall be permitted to accept money or evidences of money as a deposit to be returned to the depositor or upon the depositor's order. . . .

Id. at §4804. The Act is also bereft of any provision empowering a currency exchange to loan money.

Like the trust companies in *Gamble*, the currency exchanges in the instant case are not empowered to receive deposits as are the banks organized under the state banking act. In fact, currency exchanges in question are specifically prohibited from accepting deposits, the one activity which the courts have consistently recognized as the hallmark of a banking institution. Because a currency exchange cannot accept deposits, it more closely resembles those corporations specifically found not to be banks or banking institutions under §109(b)(2) of the Bankruptcy Code.

Indeed, the Illinois Supreme Court has also acknowledged that because a currency exchange lacks the power to accept deposits, it is not a banking institution. In *McDougall v. Lueder*, 389 Ill. 141, 58 N.E.2d 899 (1945), the court found that the enactment of the Community Currency Exchanges Act of 1943 was within the police power of the state. Several currency exchange operators had challenged the Act on constitutional grounds. The operators claimed, *inter alia*, that prohibiting a currency exchange from accepting deposits to be returned upon the depositor's order and from acting as a bailee or agent to hold money for payout upon order deprived them of equal protection of the laws. The Illinois Supreme Court responded:

> To allow the currency exchanges to engage in such activities would be to allow them to engage in the banking business without regulations and responsibilities thereupon.

Id. at 151-52, 58 N.E.2d at 904. Thus, not only have federal courts recognized that the ability to accept deposits to be returned upon the depositor's order is the hallmark of a banking institution, but Illinois' highest court has reached the same conclusion in defining a statutory provision quite similar to the one at issue herein.[6]

In light of the consistent judicial agreement that the hallmark of a bank is the ability to accept deposits, the

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[6] The United States Supreme Court has similarly recognized that the power to accept deposits is the essential characteristic of a banking business. In *Oulton v. German Savings & Loan Society*, 17 Wall 109, 118 (1873), the court stated:

> Strictly speaking, the term bank implies a place for the deposit of money as that is the most obvious purpose of such an institution.

See also, Auten v. United States National Bank, 174 U.S. 125, 141 (1898).

Director's argument that because currency exchanges are authorized to cash checks and issue money orders, as banks may also do, misses the point. The Director points out that the Illinois Banking Act defines a banking house, in part, as a place at which deposits are received "or checks paid." Ill. Rev. Stat. ch. 17 §302. The Director asks this court to infer that since check cashing is a banking business, and check cashing is also carried on by currency exchanges, a currency exchange is a banking business. This argument, however, oversimplifies. Although a currency exchange is authorized under the act to cash checks, issue money orders and offer several other services that banks may also offer, such similarity in authorization does not mean that the exchanges are the equivalent of a bank under state law. Today, in a sense, the line between banking institutions and entities that perform some banking functions may be somewhat blurred, checks may be cashed at the grocery store or at "cash stations" located on street corners and in retail stores, travelers checks may be purchased from vending machines. Yet the essential attribute of a bank or banking institution under Illinois law is the ability to accept deposits to be paid upon the depositor's order. A currency exchange lacks this ability and therefore is not classified as a bank or banking institution under Illinois law.[7]

Beyond this, in determining the nature of an entity under the state classification test, courts also look to

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[7] Currency exchanges may also offer such services as food stamp distribution, public aid check distribution, utility service contracts, license plate distribution, city sticker distribution, notary service, sale of travelers checks, photostat service and income tax service. (See Brief and Argument For Intervenor and Defendant-Intervenor Appellant at p. 28 n. 7). Most such services are not banking services.

whether the state provides a comprehensive regulatory machinery for liquidation of the entity at issue. 2 Collier's 15th ed. 1983 §109.02. In some instances, a comprehensive liquidation scheme may indicate that the state desires to protect a strong public interest by overseeing the liquidation of a particular entity. In formulating exclusions to the Bankruptcy Code, Congress intended to exclude entities subject to such comprehensive state liquidation provisions because they are bodies for which alternate liquidation provisions are made under various state regulatory laws. H.R. Rep. No. 595, 95th Cong., 1st Sess. 318 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 31 (1978).

In the instant case, the Currency Exchanges Act does contain provisions for liquidation of an exchange by the Director. Section 4825 of the Act allows the Director to appoint a receiver to handle claims against an exchange if the Director determines that any licensee is insolvent or violating the Currency Exchanges Act. The receiver may operate the exchange until the Director determines possession should be turned over to the licensee or that the business should be liquidated. Section 4826 provides for liquidation under court supervision. Sections 4827, 4829 and 4830 provide for payment of dividends upon money collected by the receiver, the disposition of actions pending against an exchange, and the disposition of the books and records of the receivership. Section 4828 outlines the powers of the receiver.

These six sections of the 52 section Currency Exchange Act stand in stark contrast to the expansive provisions of the Illinois Banking Act. Twenty-three sections of the Banking Act address the liquidation or dissolution of a state bank. Ill. Rev. Stat. ch. 17 §§362-386. Moreover, §362 provides that the power of the State Commissioner of Banks to institute proceedings for and direct the liquida-

tion of state banks shall be exclusive. The section states, in pertinent part,

> Except as authorized by the authority of the Commissioner, represented by the Attorney General, no complaint shall be filed or proceedings commenced in any court for the dissolution or for the winding up of the affairs or for the appointment of a receiver. . . .

Notably, the Director of Financial Institutions is not granted such exclusive power under the Currency Exchange Act. *See also* Ill. Rev. Stat. 17 §106(3) (1981).

Similarly, provisions for the dissolution and liquidation of Illinois savings and loan associations, Ill. Rev. Stat. ch. 17 §§3221-3267 (1981), and insurance companies, Ill. Rev. Stat. ch. 73 §§799-833 (1965 & Supp. 1983-84), are also much more comprehensive than the liquidation provisions governing currency exchanges, indicating that the Illinois legislature did not view currency exchanges and the banking institutions excluded by §109(b)(2) of the Bankruptcy Code as substantially equivalent entities. *See First American Bank & Trust Co. v. George,* 540 F.2d 343 (8th Cir. 1976).

In the same vein, the Director argues that the public or quasi-public nature of currency exchanges bolsters his position that a currency exchange is substantially equivalent to a bank. Courts have recognized that entities excluded under §109(b)(2) usually share three common characteristics: extensive state regulation, extensive statutory procedures for liquidation, and a business which is public or quasi-public in nature. *E.g., First American Bank & Trust Co. v. George,* 540 F.2d 343 (8th Cir. 1976). The public or quasi-public characteristic, however, cannot be considered in isolation. As the cases have noted, the public or quasi-public factor is found in conjunction with extensive state regulation and extensive liquidation procedures. See *id.*; *In re Portland Metro Health,* 15 Bankr. 102

(Bankr. D. Or. 1981). In the instant case, these elements are lacking and public interest alone cannot carry the day. This court certainly recognizes that the activities of a currency exchange affect the public interest, especially in light of the fact that in many areas of the state, where banks are sparse, currency exchanges perform essential services like check cashing and the issuance of money orders. The licensing, insurance and bonding requirements of the Illinois Currency Exchanges Act protect the public interest. State actions against a debtor to enforce requirements such as these will not always be prohibited. For example, license revocation proceedings brought to recover a state granted license will not always be prevented even though the licensee is a debtor in a bankruptcy proceeding. In the case of *In re Thomassen*, 15 Bankr. 907 (9th Cir. 1981), the court found that license revocation proceedings against an allegedly incompetent and dishonest doctor would not be stayed since the revocation proceedings related directly to the health and safety of the public. If state regulatory actions protect the public, the state may proceed against a debtor without regard to the debtor's position in bankruptcy court. *Id.*; *see also*, *In re Lare*, 23 Bankr. 545 (Bankr. D. Md. 1982), *aff'd*, 24 Bankr. 959 (D.C. D. Md. 1982). The liquidation procedures of the Act, however, do not vindicate the public interest, but the rights of creditors. *See In re Thomassen*, 15 Bankr. 907 (9th Cir. 1981). Thus, enforcement of the Bankruptcy Code simply does not violate the public interest under the circumstances of the instant case, nor does it interfere with state police or regulatory powers as the Director contends.[8]

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[8] The Director does not contend that any individual consumers of currency exchanges services have lost money or been injured by the insolvency of the exchanges. (Hearing, January 9, 1984).

Independent Classification Test

Looking to the language of §109 itself under the independent classification test, this court finds that the Illinois currency exchanges at issue do not fall within the exclusionary language of §109(b)(2). The language of §109, specifying which entities may be debtors under Chapters 7 and 11 of the Bankruptcy Code is very broad. 2 Collier 15th ed. 1983 §109.02. The entities excluded are few in number and are specifically enumerated. In light of the broad language of §109 and the specific enumeration of exceptions in §109(b)(2), this court finds no basis for concluding that entities beyond those specifically excluded should also be excluded. The general rule of statutory construction is that the enumeration of exclusions from the operation of a statute indicates that it should apply to all cases not specifically excluded. *Expressio unius est exclusio alterius.* 2A Sutherland Statutory Construction §47.23 (1973 & Supp. 1983). (citing cases). There is no indication in the language describing the banking entity exclusion or in the policy stated in the legislative history of the statute that Congress did not intend for this rule of statutory construction to apply. *See id.* at §47.25.[9]

Moreover, the entities excluded under §109(b)(2) are essentially the same entities that were excluded under Section 4a of the prior Bankruptcy Act. Relevant cases inter-

[9] The rules of statutory construction set forth in the Bankruptcy Code also support this conclusion. Section 102(3) of the Code specifies that the use of the words "includes" and "including" are not limiting. As Travelers Express Company, Inc., the largest creditor of the currency exchanges, points out in its brief, Congress could have used these words in describing who may be a debtor under the Code, but did not. Hence, applying the usual rule of statutory construction does not violate the rules of statutory construction set forth in the Bankruptcy Code itself.

preting this former similar provision have concluded, in determining what entities are excluded from the bankruptcy laws, that words should be given their natural meaning. *E.g., Gamble v. Daniel*, 39 F.2d 447 (8th Cir. 1930). The excluded entities relevant for purposes of this case are a "bank, savings bank, savings and loan association, building and loan association, homestead association or credit union." 11 U.S.C. §109(b)(2) As previously discussed, all of these organizations are empowered under state law to perform the essential function of a bank, acceptance of deposits. Although Collier notes that the expansive language regarding banks and similar entities was chosen to insure that the excluded entities would be stated in terms current with modern banking laws, the language does not purport to exclude entities that do not perform a banking business. *See* 2 Collier's 15th ed. 1983 §109.03. Although currency exchanges, as noted, may perform several activities that banks also perform, currency exchanges do not perform and are not permitted to perform a banking business. There is no reason based upon logic or common sense to extend the meaning of the terms described beyond their natural meaning to include Illinois currency exchanges.

Illinois Law Regarding Receiverships

The Director also points to the Illinois law governing administrative receiverships in support of his position that the bankruptcy court had no jurisdiction to entertain Chapter 11 petitions of Illinois currency exchanges. The cases cited by the Director establish that an administrative receiver is an executive officer appointed by a state official pursuant to a state statute. *People v. Niehaus*, 356 Ill. 104 190 N.E. 349 (1934). Under Illinois law, when an administrative receiver has been appointed and vested

with title and control of property under state law, a court does not have the inherent authority to appoint its own receiver. *Id.* The cases also establish that an administrative receiver appointed under an Illinois Banking Act had exclusive control over the assets of the bank and all of its debts, claims and causes of action. *McIlvaine v. City National Bank and Trust Co.*, 314 Ill. App. 496, 42 N.E. 2d 93 (1942). In such circumstances a stockholder of the bank was not able to bring a derivative suit in the name of the bank because all of the bank's rights became vested exclusively in the receiver. *Id.*

Based upon the reasoning of these cases, the Director argues that since he had appointed administrative receivers for the 33 Illinois currency exchanges at issue, no court had jurisdiction to substitute another receiver for the Director's receiver. Moreover, the Director contends that, since an administrative receiver's title to the assets is exclusive, the debtor had no power to file a Chapter 11 petition because all causes of action went to the receiver upon his appointment by the Director.

The Director's selective reliance upon state law to support the fact that the bankruptcy court lacked jurisdiction is not persuasive. In the first instance, the adminisrative receiver's title is relevant and valid for purposes of the receivership, but not for the purpose of determining the applicability of bankruptcy law to a particular debtor. Moreover, it is well-established that a corporation cannot be prevented by state statute from taking advantage of bankruptcy law. The power of Congress to establish uniform laws on the subject of bankruptcies is unrestricted and paramount. U.S. Const. art. I, §8, cl. 4; *International Show Co. v. Pinkus*, 278 U.S. 261 (1929); *see In re Palazzolo*, 20 Bankr. 692 (Bankr. E.D. Mich. 1982). Thus, even if this court assumes that the Illinois cases

discussing administrative receiverships deprive the currency exchanges of their right to avail themselves of the bankruptcy laws, such cases are not controlling. The Bankruptcy Code, not Illinois law regarding administrative receiverships, determines whether an Illinois currency exchange is a proper debtor in a Chapter 11 proceeding under the Bankruptcy Code. As previously noted, the 33 currency exchanges in the instant case are proper debtors in a Chapter 11 proceeding under the Bankruptcy Code.

Moreover, the Bankruptcy Code has provided for a situation like the instant case, where assets are in the hands of a third party prior to the filing of a bankruptcy petition. Section 101(10) of the Code recognizes that a third party may be acting to liquidate the assets of a debtor prior to the institution of bankruptcy proceedings. *See also* 2 Collier's 15th ed. 1983 §101.10. Such a pre-petition liquidator is termed a "custodian" by §101.10 of the Code. Section 101(10) defines a custodian:

> ¶ 101.10. Custodian means—
>
> (A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title:
>
> (B) assignees under a general assignment for the benefit of the debtor's creditors; or
>
> (C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors;

Obviously, such a definition is broad enough to encompass one characterized as an administrative receiver under state law. *See Flournoy v. City Finance,* 12 Bankr. 106 (Bankr. M.D. Ga. 1981); Brody, Taggart & Lee, *Practicing Under The Bankruptcy Reform Act* §7.11 (1979).

The cases cited by the Director, finding that a creditor in control of a debtor's assets is not a custodian, are not controlling. Such cases are based upon a recognition of the fact that a creditor in control of a debtor's assets is acting primarily for himself. A custodian, on the other hand, is a third party acting under mandatory authority who takes charge of the debtor's assets for the benefit of the debtor's creditors as a whole. *See e.g., In re Pride Foods, Inc.*, 22 Bankr. 356, (Bankr. DC Neb. 1982). Although cases interpreting the meaning of "custodian" under §101(10) are sparse because the section had no forerunner under the old bankruptcy act, and therefore only few recent cases exist, this court is satisfied that a custodian under §101(10) includes both administrative and executive receivers. Interpretation of §101(10) does not, under relevant cases, turn on state law classifications regarding receiverships. In light of this conclusion, the Director has no further basis to dispute that §543(b), the turnover provision of the Bankruptcy Code, was properly applied to the state appointed receiver who was directed under that section to turnover the property of the 33 currency exchanges to the bankruptcy trustee.

Automatic Stay

The Director's final attack upon the jurisdiction of the bankruptcy court is based upon the considerations of federalism and comity that are built into the Bankruptcy Code.[10] First, the Director argues that the automatic stay

[10] The Director also challenges the bankruptcy court's order under §1109(b) of the Code permitting the Director to intervene only upon a limited basis. The section operates in conjunction with Rule 24(b) of the Fed. R. Civ. P. and Rule 10-210 of the Bankruptcy Rules.

(Footnote continued on following page)

provisions of §362 of the Bankruptcy Code do not apply to the state liquidation proceedings instituted by the Director pursuant to §4826 of the Currency Exchanges Act. Under §362, upon commencement of a bankruptcy proceeding, all judicial and non-judicial actions against the debtor or the debtor's property are stayed, with certain limited exceptions. One of the actions excepted from the stay are actions to enforce the police or regulatory powers

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[10] *continued*

The section essentially provides that a party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee may raise and may appear and be heard on any issue in a Chapter 11 case. The section does not, however, limit who may be a party in interest and the section must be construed broadly. 5 Collier 15th ed. §1109.02 A bankruptcy court has discretion to allow intervention in a Chapter 11 case by parties other than those specifically designated. *Id.* Thus, a party challenging jurisdiction of the bankruptcy court has been allowed to intervene in bankruptcy proceedings, *In re Petro Marketing Group*, 4 Collier Bankr. Cas. 2d 1044 (Bankr. 9th Cir. 1981), and a state with an interest in the operation of the debtor has also been permitted to participate. *In re Citizens Loan & Thrift Co.*, 7 Bankr. 88 (Bankr. N.D. Ia. 1980). In the instant case, the state points out that the Director was permitted to intervene to the extent the Director felt that the state's interests were not being protected. (Tr. of bankruptcy proceedings, 2-18-83, pp. 9-10). In light of the fact that the Director was afforded such a wide range of participation in the bankruptcy proceedings and in view of the decision in the instant case, this court finds that the intervention afforded the Director was appropriate. 7a Wright and Miller, Federal Practice and Procedure §1923 (1972 & Supp. 1982); *see Crumble v. Blumenthal*, 549 F.2d 462 (7th Cir. 1977).

Moreover, once the appeals in the instant case were brought, this court required that the receiver and trustee consult with the Director to consider any objections or suggestions of the Director and to consult with the Director regarding the sale of the 33 currency exchanges located in Illinois.

of a governmental unit. §362(b)(4).[11] The Director claims that the administrative receiverships instituted under the Currency Exchanges Act fall within this exception.

Contrary to the Director's position, the cases and the legislative history of the Code indicate that the exception relating to governmental police and regulatory power is to be construed narrowly. For example, in *Missouri v. U.S. Bankruptcy Court*, 647 F.2d 768 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982), the court found that a state's regulatory grain laws directing a receiver to operate or liquidate the debtor's warehouse because of the debtor's insolvency did not fall within the §362(b)(4) exception. Interpreting §362(b)(4), the court stated:

> In light of the legislative history and court decisions under the earlier bankruptcy act, we believe that the term "police or regulatory power" refers to the enforcement of state laws affecting health, welfare, morals, and safety, but not regulatory laws that directly conflict with the control of the res or property by the bankruptcy court.

647 F.2d at 776. Because the purpose of state proceedings at issue was to protect a pecuniary interest in the property of the debtor's estate, not the public health, welfare, morals or safety, the court found that the bankruptcy court had exclusive jurisdiction of assets which

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[11] Section 362(b)(4) provides:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3), does not operate as a stay—

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power:

were also the subject of state proceedings. *See also In re Saugus General Hospital, Inc.*, 1 Collier Bankr. Cas. 2d 26 (Bankr. D.C. Mass. 1979).

Similarly in the case of *In re Gencarelli*, 14 Bankr. 751 (Bankr. D.R.I. 1981), the court found that a municipality's liquor license revocation proceedings were not within §362(b)(4)'s exception. Referring to the legislative history of the section, the court followed the reasoning of *Missouri v. U.S. Bankruptcy Court* and found that an exception to the automatic stay would apply when a local governmental body sought to prevent or stop violation of fraud, environmental protection, consumer protection, safety or similar police or regulatory laws. Numerous other cases interpreting §362(b)(4)'s exemption have similarly focused on whether the state proceeding at issue is designed to protect the public or is an action to protect a pecuniary interest in the property of the debtor's estate. *See* 2 Bankruptcy Service, Lawyers Edition, Code Commentary Analysis §362 n. 75 (1979 & Supp. 1983) (citing cases).

In the instant case, the sections of the Community Currency Exchanges Act which authorize liquidation under the Director's receiver, focus not on the protection of the public, but the payment of creditors. *See* Ill. Rev. Stat. ch. 17 §§4825 & 4826. The statute does not authorize liquidation proceedings against currency exchanges to stop fraud or for consumer protection, but to protect the pecuniary interests of creditors of the exchanges. Therefore, the state's administrative receivership does not fall within the §362(b)(4) exception from the automatic stay.

Burford Abstention

Finally, the Director argues that the bankruptcy court should apply Burford-type abstention and permit the pro-

ceedings instituted by the Director to continue. This court finds, however, that the policies underlying the Burford-type abstention are particularly inapplicable to the circumstances of the instant case. Burford-type abstention is appropriate where the state has a unified scheme for review of its administrative orders and federal intervention would have a disruptive effect on the state's efforts to establish a coherent policy on a matter of substantial public concern. Since this court has concluded that the liquidation and reorganization of Illinois currency exchanges is properly governed by the Bankruptcy Code, any claim of a disruptive effect upon state liquidation proceedings is not dispositive. Neither state law nor the policies behind abstention can operate to deprive a proper debtor of his right to seek relief under the Bankruptcy Code.

The cases cited by the Director in support of his claim for abstention involve conflicting state and federal common law liquidation proceedings. None of the federal proceedings were being administered under the bankruptcy laws, as in the instant case. Moreover, all the cases involve organizations specifically excluded from the reach of the bankruptcy laws, i.e., insurance and banking institutions. In each case the court found that liquidation under comprehensive state banking or insurance liquidation provisions would better serve the state and federal interests involved. In the instant case, however, as this court has already concluded, the liquidation provisions of the Community Currency Exchanges Act are unlike the liquidation provisions applicable to banks and insurance companies. In view of this conclusion, Burford abstention would be particularly inappropriate.

In addition to Burford abstention, the Bankruptcy Code also contains an abstention provision, §305(a). Under §305(a) a bankruptcy court is permitted to order dismissal

of a case or suspend all proceedings if the interests of creditors and the debtor would be better served by such action. *In re Bailey's Beauticians Supply Co.*, 671 F.2d 1063 (7th Cir. 1982). To the extent that the Director's argument is an attack on the propriety of the bankruptcy court's refusal to abstain, it must also fail.[12] Abstention pursuant to §305 is usually ordered where a proceeding in progress at the time of the bankruptcy filing is found to serve all parties better than a bankruptcy action. By its refusal to abstain in the instant case, the bankruptcy court impliedly and correctly concluded that the pending state proceeding did not better serve the parties. As previously discussed, the liquidation provisions of the Currency Exchanges Act are sparse. The Act does not provide many of the advantages available to creditors under the Bankruptcy Code; maintenance of the estate while reorganization is pending; sale of the exchanges as going businesses; protection from creditor action during reorganization; and the beneficial avoidance powers of the trustee.[13] The bankruptcy's court's refusal to abstain was therefore proper.

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[12] Although the bankruptcy court's decision under §305(a) is nonreviewable by appeal or otherwise under §305(c), an appeal of the order is proper where, as here, the appeal raises a jurisdictional issue. *Farmer v. First Virginia Bank*, 4 Bankr. 506 (E.D. Va. 1982). Moreover, in light of the decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. ____, 102 S.Ct. 258 (1982), finding infirmities in the bankruptcy court's jurisdiction, the district court is authorized under the General Order of December 20, 1982 adopted by the Northern District to make a *de novo* review of orders or judgments of bankruptcy judges.

[13] The main creditor of the currency exchanges at issue, Travelers Express Company, Inc., supported the filing of this case under the Bankruptcy Code. Travelers recognized the many benefits which would flow to itself and all creditors in the bankruptcy setting. (Brief and Argument For Travelers Express Company, Inc. at pp. 23-24).

For the reasons stated in the foregoing opinion, the orders of the bankruptcy court in the above-captioned appeals are affirmed. All appeals pertinent to the legal questions involved in this proceeding are therefore resolved.[14] This order finally resolves questions regarding jurisdiction, turnover of property, appointment of a trustee, intervention, and also resolves differing interpretations of fundamental provisions of the Bankruptcy Code. Because of its final nature, this court believes that an appeal of this order as a final order should be available under the Bankruptcy Reform Act of 1978. 16 Wright, Miller, Cooper & Grissman, Federal Practice and Procedure §3926 (Supp. 1982); *see Universal Mineral, Inc. v. C. A. Hughes & Co.*, 669 F.2d 98 (3d Cir. 1981); *Matter of Brissette*, 561 F.2d 779 (9th Cir. 1977). Appeal may also be available under 28 U.S.C. §1291 as a final decision of a district court. *See In re UNR Industries, Inc.*, No. 83-1746, slip op. *passim* (7th Cir. Jan. 17, 1984), or under the collateral order doctrine enunciated in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 546 (1949). As the court noted in *Cohen*, §1291 should be given a practical rather than a technical construction and orders which determine important rights collateral to the underlying controversy will not be denied review until the underlying controversy is finally adjudicated. *See*

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[14] The Motion to Strike the Affidavit of Donald Shine because it constitutes new evidence raised for the first time on appeal is denied. Under the General Order of December 20, 1982, adopted by the District Court for the Northern District of Illinois, this court may receive such evidence on appeal as it deems appropriate. The affidavit, however, was not considered by this court in formulating this order.

The Director's motion to waive oral argument and for an expedited ruling was granted on 12-13-83. (83 C 2640) The Director's motion to stay all bankruptcy proceedings until our ruling was denied on 12-13-83 (83-C-2640).

UNR Industries, slip op. at 9-10. But because the appeal procedure from the judgment of a district court in a bankruptcy appeal has been left in such a "sorry state of uncertainty," Wright, Miller, Cooper & Grissman, *supra* at §3926, this court alternatively finds that an appeal under 28 U.S.C. §1292(b) should be available in the interest of justice. Therefore, this court is of the opinion that its order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation. By use of this language this court intends to certify this order for interlocutory appeal pursuant to §1292(b). *See Richard Hewitt and Kenneth Higgins, Jr. v. Joyce Beverages of Wisconsin, Inc., and Joyce Beverages of Illinois, Inc.*, 721 F.2d 625 (7th Cir. 1983).[15]

It is so ordered.

/s/ JOHN A. NORDBERG
District Judge

Dated: January 27, 1984

[15] This court also notes that an appeal might also be possible under 1292(a)(2), which provides for appeals of interlocutory orders appointing receivers or to take steps to accomplish the purposes thereof since the Director's appeal centers around an order appointing a bankruptcy trustee and ordering the Director to turn over the property of the exchanges to the bankruptcy trustee.

APPENDIX C

11 U.S.C. 101(10)

§ 101. Definitions

In this title—

* * *

(10) "custodian" means—

(A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;

(B) assignee under a general assignment for the benefit of the debtor's creditors; or

(C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors;

11 U.S.C. § 109(b)(2)

§ 109. Who may be a debtor

(a) Notwithstanding any other provisions of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

(b) A person may be a debtor under chapter 7 of this title only if such person is not—

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); . . .

11 U.S.C. § 543

§ 543. Turnover of property by a custodian

(a) A custodian with knowledge of the commencement of a case under this title concerning the debtor may not make any disbursement from, or take any action in the administration of, property of the debtor, proceeds, product, offspring, rents, or profits of such property, or property of the estate, in the possession, custody, or control of such custodian, except such action as is necessary to preserve such property.

(b) A custodian shall—

(1) deliver to the trustee any property of the debtor held by or transferred to such custodian, or proceeds, product, offspring, rents, or profits of such property, that is in such custodian's possession, custody, or control on the date that such custodian acquires knowledge of the commencement of the case; and

(2) file an accounting of any property of the debtor, or proceeds, product, offspring, rents, or profits of such property, that, at any time, came into the possession, custody, or control of such custodian.

(c) The court, after notice and a hearing, shall—

(1) protect all entities to which a custodian has become obligated with respect to such property or proceeds, product, offspring, rents, or profits of such property;

(2) provide for payment of reasonable compensation for services rendered and costs and expenses incurred by such custodian; and

(3) surcharge such custodian, other than an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, for any improper or excessive disbursement, other than a disbursement that has been made in accordance with applicable law

or that has been approved, after notice and a hearing, by a court of competent jurisdiction before the commencement of the case under this title.

(d) After notice and hearing, the bankruptcy court—

(1) may excuse compliance with subsection (a), (b), or (c) of this section, if the interests of creditors and, if the debtor is not insolvent, of equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property, and

(2) shall excuse compliance with subsections (a) and (b)(1) of this section if the custodian is an assignee for the benefit of the debtor's creditors that was appointed or took possession more than 120 days before the date of the filing of the petition, unless compliance with such subsections is necessary to prevent fraud or injustice.

Ill. Rev. Stat. 1983, Ch. 17, § 4801 *et seq.*

COMMUNITY CURRENCY EXCHANGES

AN ACT in relation to the definition, licensing and regulation of community currency exchanges and ambulatory currency exchanges, and the operators and employees thereof, and to make an appropriation therefor, and to provide penalties and remedies for the violation thereof. Laws 1943, vol. 1, p. 233, approved June 30, 1943, eff. July 1, 1943. Title amended by Laws 1951, p. 562, § 2, approved June 27, 1951, eff. July 1, 1951.

4801. § .01. Repealed by P.A. 80-442, § 1, eff. Oct. 1, 1977.

4802. Definitions—Application of Act

§ 1. For the purposes of this Act: "Community currency exchange" means any person, firm, association, partnership or corporation, except an ambulatory currency exchange as hereinafter defined, banks incorporated under the laws of this State and National Banks organized pursuant to the laws of the United States, engaged in the

business or service of, and providing facilities for, cashing checks, drafts, money orders or any other evidences of money acceptable to such community currency exchange, for a fee or service charge or other compensation, or engaged in the business of selling or issuing money orders under his or their or its name, or any other money orders (other than United States Post Office money orders, Postal Telegraph Company money orders, or Western Union Telegraph Company money orders), or engaged in both such businesses, or engaged in performing any one or more of the foregoing services.

"Ambulatory Currency Exchange" means any person, firm, association, partnership or corporation, except banks organized under the laws of this State and National Banks organized pursuant to the laws of the United States, engaged in one or both of the foregoing businesses, or engaged in performing any one or more of the foregoing services, solely on the premises of the employer whose employees are being served.

"Location" when used with reference to an ambulatory currency exchange means the premises of the employer whose employees are or are to be served by an ambulatory currency exchange.

"Director" means the Director of Financial Institutions.

Nothing in this Act shall be held to apply to any person, firm, association, partnership, or corporation who is engaged primarily in the business of transporting for hire, bullion, currency, securities, negotiable or non-negotiable documents, jewels or other property of great monetary value and who in the course of such business and only as an incident thereto, cashes checks, drafts, money orders or other evidences of money directly for, or for the employees of and with the funds of and at a cost to, the person, firm, association, partnership or corporation for whom he or it is then actually transporting such bullion, currency, securities, negotiable or non-negotiable documents, jewels, or other property of great monetary value, pursuant to a written contract for such transportation and

all incidents thereof, nor shall it apply to any person, firm, association, partnership or corporation engaged in the business of selling tangible personal property at retail who, in the course of such business and only as an incident thereto, cashes checks, drafts, money orders or other evidences of money.

Amended by Laws 1959, p. 2264, § 1, eff. July 24, 1959.

4803. License to operate community currency exchange—Violation—Injunction

§ 2. No person, firm, association, partnership or corporation shall engage in the business of a community currency exchange or in the business of an ambulatory currency exchange without first securing a license to do so from the Director.

Any person, firm, association, partnership or corporation issued a license to do so by the Director shall have authority to operate a community currency exchange or an ambulatory currency exchange, as defined in Section 1 hereof.[1]

No ambulatory currency exchange and no community currency exchange shall be conducted on any street, sidewalk or highway used by the public, and no license shall be issued therefor. An ambulatory currency exchange shall be required to and shall secure a license or licenses for the conduct of its business at each and every location served by it, as provided in Section 4 hereof,[2] whether the services at such location are rendered for or without a fee, service charge or other consideration. Each plant or establishment is deemed a separate location. No license issued for the conduct of its business at one location shall authorize the conduct of its business at any other location, nor shall any license authorize the rendering of services by an ambulatory currency exchange to persons other than the employees of the employer named therein. If the employer named in such license shall move his business from the address therein set forth, such license shall thereupon expire, unless the Director has approved a

change of address for such location, as provided in Section 13.[3]

Any person, firm, association, partnership or corporation that violates this section shall be guilty of a Class A misdemeanor, and the Attorney General or the State's Attorney of the county in which the violation occurs shall file a complaint in the Circuit Court of the county to restrain the violation.

Amended by P.A. 77-2320, § 1, eff. Jan. 1, 1973.

[1] Paragraph 4802 of this chapter.

[2] Paragraph 4808 of this chapter.

[3] Paragraph 4821 of this chapter.

4804. Powers of community currency exchange

§ 3. No community or ambulatory currency exchange shall be permitted to accept money or evidences of money as a deposit to be returned to the depositor or upon the depositor's order; and no community or ambulatory currency exchange shall be permitted to act as bailee or agent for persons, firms, partnerships, associations or corporations to hold money or evidences thereof or the proceeds therefrom for the use and benefit of the owners thereof, and deliver such money or proceeds of evidence of money upon request and direction of such owner or owners; provided that nothing contained herein shall prevent a community or an ambulatory currency exchange from obtaining state automobile and city vehicle licenses for a fee or service charge, or from rendering a photostat service, or from rendering a notary service either by the proprietor of the currency exchange or any one of its employees, authorized by the State of Illinois to act as a notary public, or from selling travelers cheques obtained by the currency exchange from a banking institution under a trust receipt, or from issuing money orders or from accepting for payment utility bills. Any community or ambulatory currency exchange may enter into an agreement with any utility and other companies to act as its

agent for the acceptance of payment of utility and other companies' bills without charge to the utility customer and, acting under such agreement, may receipt for payments in the names of the utility and other companies. Any community or ambulatory currency exchange may also receive payment of utility and other companies' bills for remittance to companies with which it has no such agency agreement and may charge a fee for such service but may not, in such cases, receipt for such payment in the names of the utilities and other companies. However, funds received by currency exchanges for remittance to utility and other companies with which the currency exchange has no agency agreement shall be forwarded to the appropriate utility and other companies by the currency exchange before the end of the next business day.

Amended by P.A. 80-445, § 1, eff. Oct. 1, 1977.

4805. Income tax service

§ 3.1. Nothing in this Act shall prevent a currency exchange from rendering State or Federal income tax service; nor shall the rendering of such service be considered a violation of this Act if such service be rendered either by the proprietor or any of his employees.

Added by Laws 1949, p. 336, § 1, eff. Aug. 3, 1949.

4806. Food stamps—Distribution

§ 3.2. Community currency exchanges and ambulatory currency exchanges may engage in the distribution of food stamps in accordance with such regulations as are made by the Director.

Added by P.A. 80-439, § 1, eff. Oct. 1, 1977.

4807. Additional public services

§ 3.3. Nothing in this Act shall prevent the Director from authorizing currency exchanges to render additional services to the public if the services are consistent with

the provisions of this Act, are within its meaning, are in the best interest of the public, and benefit the general welfare.

Added by P.A. 80-1101, § 1, eff. July 1, 1978.

4808. Application for license—Contents—Fees

§ 4. Application for such license shall be in writing under oath and in the form prescribed and furnished by the Director. Each application shall contain the following:

(a) The full name and address (both of residence and place of business) of the applicant, and if the applicant is a partnership or association, of every member thereof, and the name and business address if the applicant is a corporation;

(b) The county and municipality, with street and number, if any, where the community currency exchange is to be conducted, if the application is for a community currency exchange license;

(c) If the application is for an ambulatory currency exchange license, the name and address of the employer at each location to be served by it; and

(d) The applicant's occupation or profession: a detailed statement of his business experience for the 10 years immediately preceding his application; a detailed statement of his finances; his present or previous connection with any other currency exchange; whether he has ever been involved in any civil or criminal litigation, and the material facts pertaining thereto; whether he has ever been committed to any penal institution or admitted to an institution for the care and treatment of mentally ill persons; and the nature of applicant's occupancy of the premises to be licensed where the application is for a community currency exchange license. If the applicant is a partnership, the information specified herein shall be required of each partner. If the applicant is a corporation, the said information shall be required of each officer and director thereof.

Such application shall be accompanied by a fee of $100 which fee shall be for the cost of investigating the applicant. When the application for a community currency exchange license has been approved by the Director and the applicant so advised, an additional sum of $100 as an annual license fee for a period terminating on the last day of the current calendar year shall be paid to the Director by the applicant; provided, that the license fee for an applicant applying for such a license after July 1st of any year shall be $50 for the balance of such year.

When the application for an ambulatory currency exchange license has been approved by the Director, and such applicant so advised, such applicant shall pay an annual license fee of $25 for each and every location to be served by such applicant; provided that such license fee for an approved applicant applying for such a license after July 1st of any year shall be $12 for the balance of such year for each and every location to be served by such applicant. An approved applicant shall not be required to pay the initial investigation fee of $100 more than once. Such an approved applicant for an ambulatory currency exchange license, when applying for a license with respect to a particular location, shall file with the Director, at the time of filing an application, a letter of memorandum, which shall be in writing and under oath signed by the owner or authorized representative of the business whose employees are to be served; such letter or memorandum shall contain a statement that such service is desired, and that the person signing the same is authorized so to do. The Director shall thereupon verify the authenticity of the letter or memorandum and the authority of the person who executed it, to do so.

Amended by P.A. 76-624, § 1, eff. Aug. 5, 1969.

4809. Public policy—Investigation to determine advisability of granting application—"Community" defined

§ 4.1. The General Assembly finds and declares that community currency exchanges provide important and

vital services to Illinois citizens, that the number of community currency exchanges should be limited in accordance with the needs of the communities they are to serve, and that it is in the public interest to promote and foster the community currency exchange business and to insure the financial stability thereof. Upon receipt of an application for a license for a community currency exchange, the Director shall cause an investigation of the need of the community for the establishment of a community currency exchange at the location specified in the application and the effect that granting the license will have on the financial stability of other community currency exchanges that may be serving the community in which the business of the applicant is proposed to be conducted.

"Community", as used in this Act, means a locality where there may or can be available to the people thereof the services of a community currency exchange reasonably accessible to them. If the issuance of a license to engage in the community currency exchange business at the location specified will not promote the needs and the convenience and advantage of the community in which the business of the applicant is proposed to be conducted, then the application shall be denied.

Amended by P.A. 83-652, § 1, eff. Sept. 23, 1983.

4810. Ownership held in estate—Continuing operation by Executor, etc.—License

§ 4.2. Whensoever the ownership of any Currency Exchange, theretofore licensed under the provisions of this Act, shall be held or contained in any estate subject to the control and supervision of any Administrator, executor or Guardian appointed, approved or qualified by any Court of the State of Illinois, having jurisdiction so to do, such Administrator, Executor or Guardian may, upon the entry of an order by such Court granting leave to continue the operation of such Currency Exchange, apply to the Director of Financial Institutions for a license under the pro-

visions of this Act. When any such Administrator, Executor[1] Guardian shall apply for a Currency Exchange license pursuant to the provisions of this Section, and shall otherwise fully comply with all of the provisions of this Act relating to the application for a Currency Exchange license, the Director may issue to such applicant a Currency Exchange license. Any Currency Exchange license theretofore issued to a Currency Exchange, for which an application for a license shall be sought under the provisions of this Section, if not previously surrendered, lapsed, or revoked, shall be surrendered, revoked or otherwise terminated before a license shall be issued pursuant to application made therefore under this Section.

Amended by P.A. 83-706, § 9, eff. Sept. 23, 1983.

[1] So in enrolled bill. Probably should read "Executor or".

4811. Ambulatory currency exchange—Investigation of application—Criteria

§ 4.3. Upon receipt of an application from an ambulatory currency exchange for the conduct of its business at a location to be served by it, the Director of Financial Institutions shall cause an investigation to be made to determine whether to issue said license. The Director shall employ the following criteria in making this determination:

(1) the economic benefit and convenience to the persons to be served at the location for which a license has been requested;

(2) the effect that granting a license will have on the financial stability of community currency exchanges;

(3) safety benefits, if any, which may accrue from the granting of the location license;

(4) the effects, if any, which granting of a license will have on traffic, and traffic congestion in the immediate area of the location to be served.

(5) such other factors as the Director shall deem proper and relevant.

Amended by P.A. 80-440, § 1, eff. Oct. 1, 1977.

4812. Bond—Conditions—Amount

§ 5. Before any license shall be issued to a community currency exchange the applicant shall file annually with and have approved by the Director a surety bond, issued by a bonding company authorized to do business in this State in the principal sum of $5,000.00. Such bond shall run to the Director and shall be for the benefit of any creditors of such currency exchange for any liability incurred by the currency exchange on any money orders issued or sold by the currency exchange and for any liability incurred by the currency exchange for any sum or sums due to any payee or endorsee of any check, draft or money order left with the currency exchange for collection, and for any liability incurred by the currency exchange in connection with the rendering of any of the services referred to in Section 3 of this Act.[1]

If after the expiration of one year from the issuance of the license the Director shall determine that the average amount of such liability during said year has exceeded the sum of $4,000.00 and has been less than $5,000.00, the Director shall require the licensee to furnish a bond for the ensuing year to be approved by the Director in the principal sum of $4,000.00. If such average amount is in excess of $5,000.00, the bond shall be for an additional principal sum of $1,000.00 for each $1,000.00 or fraction thereof in excess of the original $5,000.00; however, the maximum amount of such bond shall not exceed the principal sum of $100,000.00.

An ambulatory currency exchange may sell or issue money orders at any location with regard to which it is issued a license pursuant to this Act, including existing licensed locations, without the necessity of a further application or hearing and without regard to any exceptions contained in the existing licenses, upon the filing with the Director of a surety bond approved by the Director and issued by a bonding company or insurance company authorized to do business in Illinois, in the principal sum of $100,000. Such bond may be a blanket bond covering all locations at which the ambulatory currency exchange

may sell or issue money orders, and shall run to the Director for the use and benefit of any creditors of such ambulatory currency exchange for any liability incurred by the ambulatory currency exchange on any money orders issued or sold by it. Such bond shall be renewed annually. If after the expiration of one year from the date of approval of such bond by the Director, it shall appear that the average amount of such liability during the year has exceeded $100,000, the Director shall require the licensee to furnish a bond for the ensuing year, to be approved by the Director, for an additional principal sum of $1,000 for each $1,000 of such liability or fraction thereof in excess of the original $100,000, except that the maximum amount of such bond shall not be required to exceed $250,000.

Amended by P.A. 80-446, § 1, eff. Oct. 1, 1977.

[1] Paragraph 4804 of this chapter.

4813. Insurance against burglary, etc.—Amount

§ 6. Every applicant for a license hereunder shall, after his application for a license has been approved, filed with and have approved by the Director, a policy or policies of insurance issued by an insurance company or indemnity company authorized to do business under the law of this State, which shall insure the applicant against loss by theft, burglary, robbery or forgery in a principal sum as hereinafter provided: if the average amount of cash and liquid funds to be kept on hand in the office of the community currency exchange during the year will not be in excess of $5,000 the policy or policies shall be in the principal sum of $5,000. If such average amount will be in excess of $5,000, the policy or policies shall be for an additional principal sum of $500 for each $1,000 or fraction thereof of such excess over the original $5,000, provided that the maximum amount of such insurance shall in no event exceed the principal sum of $100,000. From time to time, the Director may determine the amount of cash and liquid funds on hand in the office of any community

currency exchange and shall require the licensee to submit additional policies if the same are determined to be necessary in accordance with the requirements of this Section.

Any such policy or policies, with respect to forgery, may carry a condition that the community currency exchange assumes the first $100 of each claim thereunder.

Before an ambulatory currency exchange shall sell or issue money orders, it shall file with and have approved by the Director, a policy or policies of insurance issued by an insurance company or indemnity company authorized to do business under the laws of this State, which shall insure such ambulatory currency exchange against loss by theft, burglary, robbery, forgery or embezzlement in the principal sum of not less than $500,000. If the average amount of cash and liquid funds to be kept on hand during the year will exceed $500,000, the policy or policies shall be for an additional principal sum of $500 for each $1,000 or fraction thereof in excess of $500,000, except that the maximum amount of such insurance shall in no event be required to exceed the sum of $1,500,000. From time to time the Director may determine the amount of cash and liquid funds kept on hand by an ambulatory currency exchange and shall require it to submit such additional policies as are determined to be required within the limits of this Section. No ambulatory currency exchange subject to this Section shall be required to furnish more than one policy of insurance if the policy furnished insures it against the foregoing losses at all locations served by it.

Any such policy may contain a condition that the insured assumes a portion of the loss, provided the insured shall file with such policy a sworn financial statement indicating its ability to act as self-insurer in the amount of such deductible portion of the policy without prejudice to the safety of any funds belonging to its customers. If the Director is not satisfied as to the financial ability of the ambulatory currency exchange, he may require it to deposit cash or United States Government Bonds in the

amount of part or all of the deductible portion of the policy.

Amended by P.A. 80-1364, § 6, eff. Aug. 13, 1978.

4814. Minimum funds to be kept available—Receiver

§ 7. Each community currency exchange shall have, at all times, a minimum sum of its own cash funds available for the uses and purposes of its business and said minimum sum shall be exclusive of and in addition to funds received for exchange or transfer; and in addition thereto each such licensee shall at all times have on hand an amount of liquid funds sufficient to pay on demand all outstanding money orders issued by it. Prior to January 1, 1979, this minimum sum shall be $4,000. After January 1, 1979, this minimum sum shall be $5,000.

In the event a receiver is appointed in accordance with Section 15.1 of this Act,[1] and the Director determines that the business of the currency exchange should be liquidated, and if it shall appear that the said minimum sum was not on hand or available at the time of the appointment of the receiver, then the receiver shall have the right to recover in any court of competent jurisdiction from the owner or owners of such currency exchange, or from the stockholders and directors thereof if such currency exchange was operated by a corporation, said sum or that part thereof which was not on hand or available at the time of the appointment of such receiver. Nothing contained in this section shall limit or impair the liability of any bonding or insurance company on any bond or insurance policy relating to such community currency exchange issued pursuant to the requirements of this Act, nor shall anything contained herein limit or impair such other rights or remedies as the receiver may otherwise have.

Amended by P.A. 83-345, § 9, eff. Sept. 14, 1983.

[1] Paragraph 4825 of this chapter.

4815. Exchange to be conducted as separate unit

§ 8. A community or an ambulatory currency exchange shall not be conducted as a department of another business. It must be an entity, financed and conducted as a separate business unit. This shall not prevent a community or an ambulatory currency exchange from leasing a part of the premises of another business for the conduct of this business on the same premises; provided, that no community currency exchange shall be conducted on the same premises with a business whose chief source of revenue is derived from the sale of alcoholic liquor for consumption on the premises; provided, further, that no community currency exchange hereafter licensed for the first time shall share any room with any other business, trade or profession nor shall it occupy any room from which there is direct access to a room occupied by any other business, trade or profession.

Amended by Laws 1951, p. 562, § 1, eff. July 1, 1951.

4816. No tokens to be issued

§ 9. No community or ambulatory currency exchange shall issue tokens to be used in lieu of money for the purchase of goods or services from any enterprise, except that currency exchanges may engage in the distribution of food stamps as authorized by Section 3.2.[1]

Amended by P.A. 80-439, § 1, eff. Oct. 1, 1977.

[1] Paragraph 4806 of this chapter.

4817. Qualifications of applicant—Approval—Term of license—Hearing-Denial of license—Review

§ 10. The applicant, and its officers and directors, if a corporation shall be vouched for by 2 reputable citizens of this State setting forth that the individual mentioned is (a) personally known to them to be trustworthy and reputable, (b) that he has business experience qualifying him to competently conduct, operate, own or become asso-

ciated with a currency exchange, (c) that he has a good business reputation and is worthy of a license. Thereafter, the Director shall, upon approval of the application filed with him, issue to the applicant, qualifying under this Act, a license to operate a currency exchange. If it is a license for a community currency exchange, the same shall be issued only at the place of business specified in the application. If it is a license for an ambulatory currency exchange, it shall entitle the applicant to operate only at the location or locations specified in the application, provided the applicant shall secure separate and additional licenses for each of such locations. Such licenses shall remain in full force and effect, until they are surrendered by the licensee, or revoked, or expire, as herein provided. If the Director shall not so approve, he shall not issue such license or licenses and shall notify the applicant of such denial, retaining the $100 investigation fee to cover the cost of investigating the applicant. The Director shall approve or deny every application hereunder within 90 days from the filing thereof; except that in respect to an application by an approved ambulatory currency exchange for a license with regard to a particular location to be issued by it, the same shall be approved or denied within 20 days from the filing thereof. If the application is denied, the Director shall send by United States mail notice of such denial to the applicant at the address set forth in the application.

If an application is denied, the applicant may, within 10 days from the date of the notice of denial, make written request to the Director for a hearing on the application, and the Director shall set a time and place for the hearing. The hearing shall be set for a date after the receipt by the Director of the request for hearing, and written notice of the time and place of the hearing shall be mailed to the applicant at least 15 days before the date of the hearing. The applicant shall pay the actual cost of making the transcript of the hearing prior to the Director's issuing his decision following the hearing. If, following the hearing, the application is denied, the Director shall, within 20 days thereafter prepare and keep on file

in his office a written order of denial thereof, which shall contain his findings with respect thereto and the reasons supporting the denial, and shall send by United States Mail a copy thereof to the applicant at the address set forth in the application, within 5 days after the filing of such order. A review of any such decision may be had as provided in Section 22.01 of the Act.[1]

Amended by P.A. 76-624, § 1, eff. Aug. 5, 1969.

[1] Paragraph 4843 of this chapter.

4818. Subpoenas—Documentary evidence—Hearing—Court order to obey subpoena

§ 10.1. For the purposes of this Act, the Director, and the hearing officer, as hereinafter provided, shall have power to require by subpoena the attendance and testimony of witnesses, and the production of all documentary evidence relating to any matter under hearing pursuant to the Act, and shall issue such subpoenas at the request of any interested party. The hearing officer may sign subpoenas in the name of the Director.

The Director may, in his discretion, direct that any hearing pursuant to this Act, shall be held before a competent and qualified agent of the Director, whom the Director shall designate as the hearing officer in such matter. The Director, and the hearing officer, are hereby empowered to, and shall, administer oaths and affirmations to all witnesses appearing before them. The hearing officer, upon the conclusion of the hearing before him, shall certify the evidence to the Director.

Any Circuit Court of this State, within the jurisdiction of which such hearing is carried on, may, in case of contumacy, or refusal of a witness to obey a subpoena, issue an order requiring such witness to appear before the Director, or the hearing officer, or to produce documentary evidence, or to give testimony touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Amended by Laws 1957, p. 320, § 1, eff. July 1, 1958.

4819. Form of license—Posting

§ 11. Such license, if issued for a community currency exchange, shall state the name of the licensee and the address at which the business is to be conducted. Such license shall be kept conspicuously posted in the place of business of the licensee and shall not be transferable or assignable. If issued for an ambulatory currency exchange, it shall so state, and shall state the name and office address of the licensee, and the name and address of the location or locations to be served by the licensee, and shall not be transferable and assignable.

Amended by Laws 1951, p. 562, § 1, eff. July 1, 1951.

4820. Additional bond

§ 12. If the Director shall find at any time that the bond is insecure or exhausted or otherwise doubtful, an additional bond in like amount to be approved by the Director shall be filed by the licensee within 30 days after written demand therefor upon the licensee by the Director.

Amended by Laws 1957, p. 320, § 1, eff. July 1, 1958.

4821. Number of licenses—Change of name or location

§ 13. No more than one place of business shall be maintained under the same community currency exchange license, but the Director may issue more than one license to the same licensee upon compliance with the provisions of this Act governing an original issuance of a license, for each new license.

Whenever a community currency exchange or an ambulatory currency exchange shall wish to change its name in its license, it shall file an application for approval thereof with the Director, and if the change is approved by the Director he shall attach to the license, in writing, a rider stating the licensee's new name.

(f) A reasonable profit for a currency exchange operation.

(2)(a) The schedule of reasonable maximum rates established pursuant to this Section may be modified by the Director from time to time pursuant to rules adopted in accordance with the Illinois Administrative Procedure Act.

(b) Upon the filing of a verified petition setting forth allegations demonstrating reasonable cause to believe that the schedule of maximum rates previously issued and promulgated should be adjusted, the Director shall expeditiously:

(i) Reject the petition if it fails to demonstrate reasonable cause to believe that an adjustment is necessary; or

(ii) Conduct such hearings, in accordance with this Section, as may be necessary to determine whether the petition should be granted in whole or in part.

(c) No petition may be filed pursuant to subparagraph (a) of paragraph (2) of subsection (B) unless:

(i) At least nine months have expired since the last promulgation of schedules of maximum rates; and

(ii) At least one-fourth of all community currency exchange licensees join in a petition or, in the case of ambulatory currency exchanges, a licensee or licensees authorized to serve at least 100 locations join in a petition.

(3) Any currency exchange may charge lower fees than those of the applicable maximum fee schedule after filing with the Director a schedule of fees it proposes to use.

Amended by P.A. 81-964, § 1, eff. Sept. 22, 1979.

[1] Chapter 127, ¶ 1001 et seq.

4839. Fees—Community and ambulatory currency exchanges

§ 19.4. The fees charged by community and ambulatory currency exchanges for rendering any service authorized by this Act shall be prominently displayed on the premises of the community currency exchange or at the

location served by the ambulatory currency exchange in such fashion as shall be required by the Director.

Added by P.A. 81-964, § 1, eff. Sept. 22, 1979.

4840. False swearing

§ 20. Every person having taken an oath in any proceeding or matter wherein an oath is required by this Act, who shall swear wilfully, corruptly or falsely in a matter material to the issue or point in question, or shall suborn any other person to swear as aforesaid, shall be guilty of perjury or subornation of perjury, as the case may be.

4841. Notices may be mailed

§ 21. Except as otherwise provided for in this Act, whenever the Director is required to give notice to any applicant or licensee, such requirement shall be complied with if, within the time fixed herein, such notice shall be enclosed in an envelope plainly addressed to such applicant or licensee, as the case may be, at the address set forth in the application or license, as the case may be, United States postage fully prepaid, and deposited, registered, in the United States mail.

Amended by Laws 1957, p. 320, § 1, eff. July 1, 1958.

4842. § 22. Repealed by Laws 1949, p. 335, § 2, eff. July 1, 1949.

4843. Review under Administrative Review Law

§ 22.01. All final administrative decisions of the Director hereunder shall be subject to judicial review pursuant to the provisions of the Administrative Review Law, and all amendments and modifications thereof,[1] and the rules adopted pursuant thereto. The term "administrative decision" is defined as in Section 3-101 of the Code of Civil Procedure.[2] The person seeking judicial review shall pay to the Director the costs of preparing and certifying the record of proceedings before the Director.

Amended by P.A. 82-783, Art. XI, § 24, eff. July 13, 1982.

[1] Chapter 110, ¶ 3-101 et seq.

[2] Chapter 110, ¶ 3-101.

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No. 85-305

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

**MICHAEL E. FRYZEL, Director,
Department of Financial Institutions,**

Petitioner,

VS.

CASH CURRENCY EXCHANGE, INC., *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

U.S. Const. art. I §8, cl.4

> The Congress shall have Power To:
>
> > establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

U.S. Const. art. VI, cl.2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Federal Laws

11 U.S.C. §101(10)
11 U.S.C. §109(b)(2)
11 U.S.C. §362(b)(4)
11 U.S.C. §543

State Laws

Ill. Rev. Stat. ch. 17, §4801 *et seq.*

(The text of the Federal and State laws are reprinted in Petitioner's Appendix C.)

IN THE

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MICHAEL E. FRYZEL, Director,
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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent, Travelers Express Company, Inc. ("Travelers Express")[1] respectfully requests that the Petition for a Writ of Certiorari of Michael E. Fryzel, Director of the Illinois Depart-

[1] Travelers Express Company, Inc. is a wholly-owned subsidiary of The Greyhound Corporation. Its affiliates include Aircraft Service Intl., Inc., Armour-Dial, Inc., Armour Handcrafts, Inc., Armour International Co., Dispatch Services, Inc., Faber Enterprises, Inc., Florida Export Tobacco Co., Inc., Florida Export Warehouse Corp., Glacier Park, Inc., Consultants & Designers, Inc., Greyhound Exhibitgroup, Inc., Greyhound Temporary Personnel, Inc., Greyhound Capital Corporation, Greyhound Exposition Services, Inc., Greyhound Food Management, Inc., Greyhound Leasing & Financial Corp., Greyhound Lines, Inc., Greyhound Support Services, Inc., MCI Acceptance Corp., Verex Corp., New Mexico Transportation Co., Inc., Pine Top Insurance Company, Post House, Inc., Texas, New Mexico & Oklahoma Coaches, Inc., Transportation Manufacturing Corp., Universal Coach Parts, Ver-

ment of Financial Institutions (the "Director") be denied. This case is not worthy of certiorari because it determines only a simple question of Illinois law, whether a currency exchange is a bank. The Director argues that currency exchanges, forbidden by Illinois law from accepting deposits and not authorized to make loans, are banks, which may not be debtors under the Bankruptcy Code (the "Code"), 11 U.S.C. §101 *et seq.* Alternatively, the Director argues that, by enabling currency exchanges to seek bankruptcy relief, Congress wrongfully wrests control over the liquidation of currency exchanges from the states. The Director makes these arguments because he seeks to exercise complete control over the liquidation of currency exchanges whose capital is impaired and to deny such currency exchanges and their creditors the protection and reorganization alternatives which the Code provides.

By arguing that currency exchanges are the "substantial equivalent" of banks, the Director in essence asks the Court to create a new category of person or entity precluded from seeking bankruptcy relief under Section 109(b)(2) of the Code. In making this argument, the Director not only asks the Court to amend the Code, but to repudiate Illinois statutes and case law which clearly distinguish currency exchanges from banks.

By arguing, alternatively, that Congress wrongfully placed control over the liquidation of currency exchanges in the hands of the bankruptcy courts, the Director proposes to turn the entire federal system topsy-turvy and to have the Court rewrite both the Bankruptcy clause and the Supremacy clause of the Constitution. The Director does not assert any conflict between the Seventh Circuit and any other Circuit.

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mont Transit Co., Inc. These affiliates are either subsidiaries of The Greyhound Corporation or subsidiaries of such subsidiaries.

REASONS THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

A. Under Illinois Law, Currency Exchanges Are Not Banking Institutions

When the Director argues that "it is crucial that this Court provide insight into the true nature of services provided by community currency exchanges . . ." (P.C. at 9-10)[2], the Director overlooks the fact that both the Illinois legislature and the Illinois Supreme Court have prohibited currency exchanges from accepting deposits and thereby conducting banking business. Illinois statutory law prohibits currency exchanges from accepting deposits. Ill. Rev. Stat. ch. 17, §4804.3 (1983) (App. at C-6)[3] In upholding the prohibition, the Illinois Supreme Court specifically stated that the regulations of the Illinois Community Currency Exchanges Act, 17 Ill. Rev. Stat. ch. 17, §4801 *et seq.* (1983) (the "Currency Exchanges Act") are insufficient to allow currency exchanges to engage in banking business. *McDougall* v. *Leuder*, 389 Ill. 141, 151-52, 58 N.E.2d 899 (1945). The *McDougall* court stated:

> To allow currency exchanges to engage in such activities would be to allow them to engage in banking business without the regulations or reponsibilities attendant thereupon.

389 Ill. at 151-2. According to the Seventh Circuit, the power to accept deposits is the "touchstone" of the "state classification" test, the test courts apply to determine if an institution is classified as a bank by the state. *First American Bank & Trust Co.*

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[2] "P.C." refers to Petition for Certiorari.

[3] "App." refers to Petitioner's Appendix.

v. *George*, 540 F.2d 343 (8th Cir.) *cert. denied*, 429 U.S. 1011 (1976). (App. at A-16)[4]

The Director states that no court has ruled on whether currency exchanges constitute the equivalent of banking institutions under the "state classification" test. (P.C. at 9) While true, this argument overlooks the fact that Illinois, a state with extensive currency exchange regulations, has forbidden currency exchanges from engaging in banking business. This fact led both the Seventh Circuit and the District Court to conclude that Illinois currency exchanges were not substantially equivalent to the banking institutions precluded by Section 109(b)(2) from seeking relief under the Bankruptcy Code. The Illinois position is clear; there is no question of the "true" nature of currency exchange services for this Court to decide.

B. The Bankruptcy Court Did Not Improperly Interfere With The Illinois Currency Exchange Regulation System

The Director argues that the Bankruptcy Court has improperly interfered with the Illinois system of regulating and liquidating currency exchanges. As support, the Director contends that the "public interest" would be better served by giving priority to state regulation of currency exchanges over bankruptcy relief, and that bankruptcy would interfere with Illinois' "elaborate" scheme for liquidating currency exchanges. Both of these arguments are misplaced.

The argument that it would better serve the "public interest" to defer to state regulation of currency exchanges ignores the substance and purpose of the liquidation provisions of the Currency

---

[4] This Court agrees. In *Oulton* v. *German Savings & Loan Society*, 17 Wall 109, 118 (1873), the Court stated:

> Strictly speaking, the term bank implies a place for the deposit of money as that is the most obvious purpose of such an institution.

Exchanges Act. The primary purpose of the liquidation provisions is to protect creditors, not to protect the public interest. The liquidation provisions speak only of the protection of creditors. Ill. Rev. Stat. ch. 17, §§ 4825-4830 (1983). (App. at C-24-27)

Although the Seventh Circuit recognized that by providing "vital services," currency exchanges affect the public interest, the Court specifically found that the liquidation provisions of the Currency Exchanges Act do not vindicate the public interest. That interest is served by the licensing, insurance and bonding requirements of the Currency Exchanges Act, which the turnover order did not affect. (App. at A-16-17)

The Director also contends that bankruptcy interferes with the Illinois liquidation scheme, citing *Woolsey v. Security Trust Co.*, 74 F.2d 334 (5th Cir. 1935). In *Woolsey*, the Fifth Circuit held that an "elaborate scheme of liquidation," which a state created to regulate its trust companies, could not be overridden by bankruptcy proceedings. The Director's reliance on the *Woolsey* case is misplaced. Far from an elaborate scheme, the Illinois liquidation scheme is, in the words of the Seventh Circuit, "skeletal." (App. at A-15)

The liquidation provisions do not address the public funds which are at risk during "the float" period, nor do they provide for the reorganization or rehabilitation of an insolvent currency exchange. When the District Court compared the liquidation provisions of the Currency Exchanges Act to those of other Illinois entities specifically excluded from bankruptcy relief by Section 109(b)(2), it found a "stark contrast." (App. at B-13-15)

Had the Illinois legislature recognized a strong public interest in direct state supervision and control of liquidation of currency exchanges, it would have provided a more elaborate liquidation scheme. Instead, the legislature formulated six sections which are primarily aimed at protecting the interests of creditors. The Bankruptcy Code more than adequately protects that interest. It

does so in an elaborate statutory scheme which puts creditors on an equal footing with one another, provides safeguards against loss or diminution of the estate, grants broad powers to the bankruptcy trustee or debtor in possession to avoid preferences, fraudulent conveyances, and unperfected liens, and gives creditors a substantial voice in the reorganization process. Few, if any, of these features are present in the state liquidation scheme.

C. The Seventh Circuit's Holding That The State-Appointed Receiver Was A Custodian Within The Meaning Of Section 101(10) Of The Bankruptcy Code Does Not Violate The Separation Of Powers Doctrine

The Director argues that, as an administrative receiver under Illinois law, the state-appointed receiver had exclusive title to and control of the Debtor's assets, and that the appointment of the Chapter 11 trustee violated the separation of powers doctrine. Once again, the Director's argument misses the point and merely repeats the same arguments rejected by the District Court and the Seventh Circuit.

The Director's argument also overlooks the plain language of the Code. Section 543(b)(1) of the Code provides that a custodian of property of a debtor must turn over such property to the debtor or to the bankruptcy trustee. Section 101(10) defines custodian as follows:

> (A) receiver or trustee of any of the property of the debtor, appointed in a case or proceeding not under this title;
>
> (B) assignee under a general assignment for the benefit of the debtor's creditors; or
>
> (C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors.

11 U.S.C. §101(10). (App. at C-1)

Although the Director acknowledges that the legislative history of Section 101(10) recognizes that the categories of custodian are descriptive rather than exhaustive, S.Rep. No. 989, 95th Cong. 2d Sess. 23(1978), the Director argues that the term "custodian" encompasses only court-approved receivers and not administrative receivers. The unrestrictive language of the statute does not support this argument. Both the Seventh Circuit and the District Court so found.

Moreover, the fact that the receiver had title to the Debtors' property under Illinois law is irrelevant. The legislative history of Section 543 expressly supports the conclusion that the term "custodian" includes prepetition liquidators who hold title to a debtors' assets. The legislative history defines the property of the debtor which must be turned over to the bankruptcy trustee:

> Property of the debtor in section (a) includes property that was property of the debtor at the time the custodian took the property, but the title to which passed to the custodian.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 370(1977); S. Rep. No. 989, 95th Cong., 2d Sess. 84 (1978).

Neither considerations of federalism nor the separation of powers doctrine ought alter the result in this case. Indeed, such considerations *support* the result. Congress alone has the power to establish uniform laws on bankruptcy, and the states cannot interfere with that power. U.S. Const. art. I §8, cl.4; U.S. Const. art. VI, cl.2. Title 11 specifically precludes certain entities from seeking bankruptcy relief, and suspends state insolvency proceedings in all other cases in which bankruptcy jurisdiction is invoked. Illinois currency exchanges are not precluded from seeking and obtaining relief under the Bankruptcy Code.

CONCLUSION

For the foregoing reasons, respondent Travelers Express Company, Inc. respectfully requests that the Petition for a Writ of Certiorari of Michael E. Fryzel, Director, Department of Financial Institutions be denied.

Respectfully submitted,

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No. 85-305

Supreme Court, U.S.
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In the
Supreme Court of the United States

October Term, 1985

MICHAEL E. FRYZEL, Director,
Department of Financial Institutions,
Petitioner,

vs.

CASH CURRENCY EXCHANGE, INC., et al.,
Respondents.

RESPONSE OF CASH CURRENCY EXCHANGE, INC., TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a community currency exchange, licensed by an operating in the State of Illinois, is precluded from filing for Chapter 11 reorganization either by operation of section 109(b)(2) of the Bankruptcy Code (11 U.S.C. section 109(b)(2)) or considerations of comity.

2. Whether a receiver appointed pursuant to section 15.1 of the Illinois Currency Exchange Act (Ill. Rev. Stat. Ch. 17, para. 4825) is a custodian within the meaning of sections 101(10) and 543 of the Bankruptcy Code (11 U.S.C. sections 101(10), 543).

3. Whether the Seventh Circuit Court of Appeals, after finding that a community currency exchange may be a debtor under the Bankruptcy Code, erred in further holding that there is no federal policy which compels a bankruptcy court from abstaining from exercising jurisdiction over the respondents' Chapter 11 bankruptcy cases.

PARTIES

The Respondents in this Petition, as set forth in the caption as "CASH CURRENCY EXCHANGE, INC., et al." include DONALD C. SHINE, RECEIVER; the 33 debtor community currency exchanges located in Illinois: 59th & HALSTED CURRENCY EXCHANGE, INC., PULASKI JACKSON CURRENCY EXCHANGE, INC., DIVISION DAMEN CURRENCY EXCHANGE, INC., LAKE LARAMIE CURRENCY EXCHANGE, INC., 147th & LOOMIS CURRENCY EXCHANGE, INC., NORTH HALSTED CURRENCY EXCHANGE, INC., CICERO CHICAGO CURRENCY EXCHANGE, INC., OGDEN KEDZIE CURRENCY EXCHANGE, INC., ROOSEVELT AUSTIN CURRENCY EXCHANGE, INC., LAKE PULASKI CURRENCY EXCHANGE, INC., CHICAGO CENTRAL CURRENCY EXCHANGE, INC., ZENITH CURRENCY EXCHANGE, INC., BELMONT KIMBALL CURRENCY EXCHANGE, INC., KEDZIE CARROLL CURRENCY EXCHANGE, INC., BROADWAY LAWRENCE CURRENCY EXCHANGE, INC., 79th & EXCHANGE CURRENCY EXCHANGE, INC., JACKSON HOMAN CURRENCY EXCHANGE, INC., 51st & ASHLAND CURRENCY EXCHANGE, INC., 85th & BURLEY CURRENCY EXCHANGE, INC., 69th & ASHLAND CURRENCY EXCHANGE, INC., LARAMIE LAKE CURRENCY EXCHANGE, INC., MADISON CALIFORNIA CURRENCY EXCHANGE, INC., MADISON OAK PARK CURRENCY EXCHANGE, INC., ASHLAND GRAND CURRENCY EXCHANGE, INC., MADISON DAMEN CURRENCY EXCHANGE, INC., CENTRAL DIVISION CURRENCY EXCHANGE, INC., ROOSEVELT DAMEN CURRENCY EXCHANGE, INC., CICERO ARMITAGE CURRENCY EXCHANGE, 51st & HALSTED CURRENCY EXCHANGE, INC., CHICAGO CLARK CURRENCY EXCHANGE, INC., MILWAUKEE CLARK CURRENCY EXCHANGE, INC., 43rd & COTTAGE GROVE CUR-

RENCY EXCHANGE, INC., and BREMENTOWNE CURRENCY EXCHANGE, INC., TRAVELERS' EXPRESS CO., and UNSECURED CREDITORS' COMMITTEE.

The Petitioner is MICHAEL E. FRYZEL, Director of the Department of Financial Institutions of the State of Illinois.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-305

MICHAEL E. FRYZEL, Director,
Department of Financial Institutions,
Petitioner,

vs.

CASH CURRENCY EXCHANGE, INC., et al.,
Respondents.

RESPONSE OF CASH CURRENCY EXCHANGE, INC., TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of United States Court of Appeals for the Seventh Circuit was entered on May 21, 1985, and has been officially reported at 762 F.2d 542. The opinion of the United States District Court for the Northern District of Illinois is reported at 37 Br 617 (D. C. 1984). The opinions are reprinted in the petitioner's appendix.

JURISDICTION

Cash Currency Exchange, Inc. adopts the jurisdictional statement of the petitioner.

STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions stated in the Petition, the following statutory provisions are involved and are reprinted in the appendix contained within this volume:

United States Constitution, art. I, sec. 8, cl. 4
United States Constitution art. VI, cl. 2
11 USC section 102(3)
11 USC section 109
11 USC section 305

INTRODUCTORY STATEMENT

Cash Currency Exchange, Inc., is the first named of the fifty-seven debtors which filed bankruptcy petitions on February 10, 1973. Hereafter, any reference to Cash Currency Exchange, Inc. shall be a reference to all fifty-seven debtor respondents which are parties to the petition.

STATEMENT OF THE CASE

Cash Currency Exchange, Inc. adopts the statement of the case presented by the Petitioner (hereinafter, "the Director") with the following addition.

On February 10, 1983, fifty-seven related Chapter 11 reorganization cases were commenced by the filing of voluntary petitions in the United States Bankruptcy Court for the Northern District of Illinois, where those cases are pending under joint administration. Thirty-three of the debtors were licensed community currency ex-

changes and are parties to this Petition. Eleven of the debtors were currency exchanges duly authorized to do business from locations in Indiana, Michigan, Missouri, Ohio, Wisconsin and the District of Columbia. Thirteen of the debtors were management companies servicing the forty-four operating currency exchanges.

On February 4, 1983, after the appointment of the Director's receiver, but prior to the commencement of the Title 11 cases, the Attorney General for the State of Illinois filed thirty-three complaints in chancery in the Circuit Court of Cook County Illinois for the orderly liquidation of each of the Illinois debtor exchanges (Supp. to record admitted Jan. 24, 1984, D.Tr. 19-20). These complaints were apparently filed under authority of section 15.1a of the Community Currency Exchange Act, *Ill. Rev. Stat.* ch. 17 para. 4826 (C-25).

REASONS FOR DENYING THE REQUEST FOR ISSUANCE OF A WRIT OF CERTIORARI

Introduction

The primary issue presented by the Director in the trial court and the two appellate courts which have already reviewed this case is whether a community currency exchange, engaged in the business of cashing checks and selling money orders, is prohibited from being a debtor under Chapter 11 of the Bankruptcy Code by operation of section 109(b)(2) of the code, (11 U.S.C. section 109(b)(2)). This was the first substantive issue addressed by both the district court and the court of appeals, and the issue given the most analysis and consideration by each of those appellate tribunals. Both the District Court for the Northern District of Illinois and the Court of Appeals for the Seventh Circuit had little difficulty in finding that a community currency exchange was not within the class of enterprises excluded from bankruptcy relief by section 109.

The Director, in his statement of questions presented for review, appears to have abandoned his earlier theory that a community currency exchange falls within the excluded class. Rather, he seeks review of a different question which he raised in the lower courts. That is, whether the bankruptcy court was compelled to abstain from taking jurisdiction over a properly filed bankruptcy case on the basis of comity or Illinois public policy as it relates to these currency exchange debtors. Even though the Director, in his petition, raises two issues for review, one relating to the filing of the cases and the other to the receiver's status as a "custodian", he makes essentially

the same comity or public policy argument as the basis for issuance of the writ as to each issue.

I. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS CORRECT AND NOT SUBJECT TO SERIOUS DISPUTE.

The specific question of whether a community currency exchange, licensed by and operating in Illinois, is precluded from bankruptcy protection by section 109(b)(2) may be novel. However, the Seventh Circuit and the district court were able to use long standing precedents, well established legal principles and clear statutory language to support the finding that a currency exchange is eligible to file a petition for relief under the Bankruptcy Code. The court of appeals broke no new ground either in its treatment of applicable decisional law or its construction of the Bankruptcy Code and its predecessor, the Bankruptcy Act (11 U.S.C. sections 1 et seq. repealed 1979). The court's refusal to accept the Director's public policy argument was equally well-founded. Indeed by focusing the issues to those dealing with abstention, the Director impliedly concedes the correctness of the holding of the Seventh Circuit Court of Appeals that a community currency exchange is not within the class of enterprises excluded from bankruptcy relief by section 109(b)(2).

The argument that the bankruptcy court should have abstained from hearing this title 11 case over which federal bankruptcy jurisdiction otherwise exists can only be premised on two possible bases:

a) abstention under section 305 of the Bankruptcy Code or;

b) abstention under the doctrine of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

A bankruptcy court's decision not to abstain under section 305 is not subject to further review at any time. See section 305(c) of the Bankruptcy Code (11 U.S.C. section 305(c)), *In re Covey*, 650 F. 2d 877, 880 (7th cir. 1981) and the opinion of the Court of Appeals at A-25 (762 F.2d at 555).

The *Burford* doctrine simply does not have applicability to bankruptcy cases where Congress has determined what business enterprises are entitled to liquidate or reorganize under the Bankruptcy Code. Federal bankruptcy legislation has preempted the field as to those enterprises which Congress has determined may avail themselves of bankruptcy. The existence of alternate or even adequate state liquidation or regulatory procedures, which might justify a *Burford* type abstention in non bankruptcy situations, has no applicability in the area of bankruptcy.

II. THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH ANY DECISION OF ANOTHER COURT OF APPEALS ON ANY ISSUE PRESENTED BEFORE IT OR OVER WHICH FURTHER REVIEW IS SOUGHT.

There is no conflict among the courts of appeals on any substantial issue arising in this case or presented for further review. The Director is in error when he suggests that such a conflict exists by citing *Israel-British Bank (London) Ltd.* v. *The Fed. Dep. Ins. Corp.*, 536 F.2d 509 (2nd cir. 1976) as holding the existence of state statutes for liquidating or regulating a business provides a sufficient basis for compelling abstention over an other-

wise proper bankruptcy case. First, the issue before the court in *Israel British Bank* was whether a foreign corporation engaging in banking in London, but not in the United States, was a "banking corporation" excluded from bankruptcy under section 4 of the Bankruptcy Act (11 U.S.C. section 22, repealed 1979), predecessor to section 109 of the Bankruptcy Code. The Court of Appeals for the Second Circuit *held* the enterprise was not a banking corporation precluded from bankruptcy relief. The issue presented for review in this case, as fashioned by the Director himself, is whether abstention from bankruptcy should be required because of the nature of the state regulation of community currency exchanges. The issue presented to the Second Circuit Court of Appeals in *Israel British Bank* was not analogous, and the passage quoted by the Director at page 15 of his petition is clearly *dicta* taken out of context.

Similarly, the suggestion of a conflict among the circuits created by the Director's citation of *Woolsey* v. *Security Trust Co.*, 74 F.2d 334 (5th cir. 1935) and *First American Bank and Trust Co.* v. *George,* 540 F.2d 343 (8th cir.) cert denied 424 U.S. 1011 (1976) is misleading. Both decisions involved a determination of whether the business enterprise was a "banking corporation" excluded from bankruptcy under section 4 of Bankruptcy Act. Neither dealt with either unwarranted interference with state law or with abstention from taking bankruptcy jurisdiction over a business otherwise eligible for bankruptcy relief. In both cases, the business in question was clearly a bank as defined by applicable local statutes. Therefore, in each instance the bankruptcy petition was dismissed. Neither court even considered an expansion of the excluded class or abstention for reasons of comity of policy.

There is no conflict among the courts of appeals concerning the exclusions under Section 109 of the Bankruptcy Code or Section 4 of the prior Bankruptcy Act. Neither does the Seventh Circuit's refusal to compel abstention from a case involving a community currency exchange either chart new legal territory or create a conflict among the various courts of appeals. Accordingly, review by writ certiorari is unwarranted.

III. FURTHER REVIEW OF THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS WILL UNDERMINE RATHER THAN ADVANCE PRINCIPLES OF FDERALISM.

Contrary to the Director's arguments, discretionary review by a writ of certiorari will undermine principles of federalism rather than advance them. The Director is essentially asking this Court to judicially amend the Bankruptcy Code by either including a community currency exchange in the prohibited class or by creating authorization for a judicially created abstention doctrine where bankruptcy jurisdiction would otherwise exist. The power to enact uniform bankruptcy legislation is delegated to Congress under the United States Constitution, at article I, section 8, clause 4. Although Congress does not have to enact such legislation, once it does the federal statute preempts all state laws within the field by virtue of article VI, clause 2 of the United States Constitution, the so-called "Supremacy Clause".

The determination of the policies to be advanced by bankruptcy legislation and the selection of the persons or business eligible or to be excluded from bankruptcy relief is committed to the sole discretion of Congress. The cases cited by the Director, as well as the authorities

relied upon by the Seventh Circuit Court of Appeals, reveal that considerations of federalism and the existence of alternative liquidation procedures were considered by Congress in deciding which entities should be excluded from bankruptcy relief under Section 4 of the Bankruptcy Act and Section 109 of the Bankruptcy Code. It is not the function of the judiciary to alter or amend the Bankruptcy Code because the Director is dissatisfied with the scope of the exclusions of Section 109 or the nature of the abstention doctrine articulated in Section 305 of the Bankruptcy Code. Congress did not draft Section 109 or Section 305 in a manner calculated to invite judicial additions to the class of excluded enterprises or the circumstances under which abstention should be granted. It could have done so by invoking the drafting technique and rules of construction contained within the Bankruptcy Code itself. Under Section 102(3) of the Code, "the words 'includes' and 'including' are not limiting" (11 U.S.C. section 102(3)). Congress made the list of excluded entities and the circumstances under which abstention should be considered exhaustive rather than illustrative by not using the words "includes" or "including" in sections 109 and 305.

Acceptance of the position advocated by the Director will necessarily erode the constitutional mandate that Congress be vested with the authority to enact uniform bankruptcy legislation. When all the extraneous dressing is removed from the Director's argument, it boils down to the proposition that the several states, by enacting regulatory legislation over a class of business enterprises whose activity affects the public, can exempt those enterprises from seeking bankruptcy under Title 11 of the United States Code. The states have legitimate reasons

to regulate many types of business activities, and in fact do so. However, the existence of state regulatory statutes has never provided any court with a basis for depriving a business or person not otherwise statutorily excluded, from seeking bankruptcy relief. Indeed, some of the most heavily regulated enterprises are eligible for bankruptcy relief, despite the quasi-public nature of their activities *e.g.* municipalities, railroads, utilities, common carriers, oil companies, securities and commodities dealers.

The possible erosion of the mandate that Congress enact uniform bankruptcy legislation is pointed out by the facts of this case. Cash Currency is one of fifty-seven related debtors who filed for reorganization under Chapter 11. All of the debtors had common shareholders and the cases are being jointly administered in the Bankruptcy Court for the Northern District of Illinois. Among the debtors are companies which operate community currency exchanges in Missouri, Wisconsin, Michigan, Indiana, and the District of Columbia. Using the Director's rationale, it would be possible that the Illinois currency exchanges would be precluded from bankruptcy relief, while the non-Illinois exchanges, located in states which have not articulated the same policies as Illinois, would not be judicially excluded. Not only would the result be absurd in this case, the effect would be a chaotic and unworkable bankruptcy system as it relates to national and interstate businesses.

IV. ALLOWING CASH CURRENCY EXCHANGE INC., TO LIQUIDATE OR REORGANIZE IN BANKRUPTCY DOES NOT NEGATIVELY AFFECT THE POLICIES THE DIRECTOR ARTICULATES AS A BASIS FOR GRANTING THE WRIT.

The Director emphasizes the state's public interest in regulating the operation of community currency exchanges as the primary basis upon which he asks this Court to grant further review by a writ of certiorari. However, the Director's premise does not stand up under scrutiny. The Seventh Circuit Court of Appeals, at A-16, 762 F.2d at 551, aptly noted that Sections 15-15.1(e) of the Community Currency Exchange Act (*Ill. Rev. Stat.* Chapter 17 paras. 4825-4830), governing receiverships, is a liquidation statute concerned with creditors' rights. This portion of the Community Currency Exchange Act, under which the Director's receiver, Donald Shine, was appointed is not designed to implement or vindicate the public interest or policies upon which the Director premises his request for issuance of the writ. The capital, bonding, and operating requirements imposed on community currency exchanges by the state are dealt with in other portions of the Act and are not impaired by a licensee's filing of a Chapter 11 bankruptcy reorganization. Only the liquidation/receivership portion of the Community Currency Exchange Act is affected by the intervention of bankruptcy. State and federal receiverships are routinely interrupted or stayed by a subsequent bankruptcy petition.

Further, the Community Currency Exchange Act in general and the receivership statute (Sections 15-15.1(e)) in particular do not provide a mechanism for reorganization. The receiver takes over the assets of the business and can either return them to the licensee or institute a

judicial proceeding for liquidation. In this case he caused liquidation proceedings to be instituted in the Circuit Court of Cook County. There is no invasion of the legitimate police or regulatory power of the state by allowing a community currency exchange to reorganize or liquidate in bankruptcy. A debtor-in-possession is subject to all of the applicable statutes and regulations affecting community currency exchanges in their business operations. The Director does not suggest anything to the contrary. It is difficult to see exactly how a bankruptcy petition impinges upon any public policy articulated by the Director in his petition or set forth in the Community Currency Exchange Act.

V. FURTHER REVIEW IS UNWARRANTED SINCE THE CONSEQUENCES OF THE RELIEF REQUESTED BY THE DIRECTOR WILL RENDER THE BANKRUPTCY SYSTEM UNWORKABLE.

If review is granted over this matter, the only way this Court will be able to grant the Director his relief is to establish a new abstention doctrine by which the judiciary may allow abstention for reasons not articulated in the Bankruptcy Code. The Director advances several purported state policies as a justification for seeking abstention in this instance. However, no workable standard could ever be adopted so that lower courts would be properly guided on when to authorize or compel abstention. The several states can have differing policies and regulatory schemes for the same business activity or enterprise. Does that mean that the accident of where a business happens to be incorporated or have its principal place of business will determine whether it can seek federal bankruptcy protection? What would happen in the

case of truly regional or national business enterprises, such as common carriers? An enterprise can affect the public interest of the state even if it neither incorporates nor establishes its principal place of business within the state.

Equally as important, the business enterprises themselves will have no way of predicting whether they can reorganize or liquidate under the provisions of the Bankruptcy Code. Every business bankruptcy filing will be subject to an attack that abstention is mandated by a purported infringement upon a state's public policy. Such a result would be unworkable, both from the point of view of persons or businesses who will avail themselves of bankruptcy protection and the judiciary which must interpret the Bankruptcy Code and resolve these jurisdictional issues. This Court should exercise its discretion by refusing to grant the writ, which would certainly invite a chaotic result. Rather, the well founded decision of the Court of Appeals for the Seventh Circuit should not be subjected to further review.

VI. THE DIRECTOR'S REQUEST FOR THE WRIT IS PREMISED UPON ASSUMPTIONS AND GENERALIZATIONS FOR WHICH NO AUTHORITY IS CITED.

The Director's petition contains numerous assumptions and assertions about the nature of community currency exchanges, their clientele, their social function and their place in the community of financial institutions. None of those assumptions or generalizations are supported either by the record or a citation to an authority outside of the record. Neither this respondent nor the Court has any basis for determining whether the socio-economic

generalizations relied upon by the Director are true or verifiable. Neither can we know upon what facts such generalizations are based. Cash Currency Exchange, Inc., suggests that this Court ignore these totally unsupported assertions and focus its analysis upon the legal principles involved and the consequences of further review.

CONCLUSION

There is no conflict among the various courts of appeals as to any issue presented for review. The Director does not suggest that the Seventh Circuit Court of Appeals decided any issue of state law in conflict with the Illinois Supreme Court. The primary issues of federal law resolved by the Seventh Circuit in its decision relate to:

1) who may be a debtor under the bankruptcy code;
2) whether the Director's receiver is a custodian; and,
3) whether, after finding that a community currency exchange may be a debtor, abstention is warranted.

When deciding each question, the Seventh Circuit Court of Appeals has resolved the issue consistent with all existing authority. Given the uncertainty and perils neces-

sarily attendant upon granting the relief requested by the Director, this Court should exercise its discretion in not granting the writ of certiorari.

Respectfully submitted,

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APPENDIX

7287A

NO. 85-305

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

MICHAEL E. FRYZEL, Director Department of Financial Institutions,

Petitioner,

v.

CASH CURRENCY EXCHANGE, INC., et al.,

Respondents.

APPENDIX OF CASH CURRENCY EXCHANGE, INC.

UNITED STATES CONSTITUTION
ARTICLE I, SECTION 8, CL. 4

The Congress shall have Power To . . . to establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

UNITED STATES CONSTITUTION
ARTICLE VI, CL. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

11 U.S.C. SECTION 102(3)

In this title—

(a) "includes" and "including" are not limiting.

11 U.S.C. SECTION 109

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title [11 U.S.C.S. sections 101 et seq.].

(b) A person may be a debtor under Chapter 7 of this title [11 U.S.C.S. sections 701 et seq.] only if such person is not—

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)) [12 USCS section 1813(h)]; or

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

(c) An entity may be a debtor under chapter 9 of this title [11 USCS sections 901 et seq.] if and only if such entity—

(1) is a municipality;

(2) is generally authorized to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law

to authorize such entity to be a debtor under such chapter 11 USCS section 901 et seq.;

(3) is insolvent or unable to meet such entity's debts as such debts mature;

(4) desires to effect a plan to adjust such debts; and

(5) (A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter 11 USCS section 901 et seq.;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under chapter 11 USCS section 901 et seq.;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title [11 USCS section 547].

(d) Only a person that may be a debtor under chapter 7 of this title [11 USCS section 701 et seq.], except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title [11 USCS sections 1101 et seq.].

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 may be a debtor under chapter 13 of this title [11 USCS sections 1301 et seq.].

(f) Notwithstanding any other provision of this section, no individual may be a debtor under this title [11 USCS sections 1101 et seq.] who has been a debtor in a case pending under this title [11 USCS section 101 et seq.] at any time in the preceding 180 days if—

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title [11 USCS section 362].

(Nov. 6, 1978, P. L. 95-598, Title I, section 101, 92 Stat. 2557; Oct. 15, 1982, P. L. 97-320, Title VII, section 703(d), 96 Stat. 1539; July 10, 1984, P. L. 98-353, Title III, Subtitle A, section 301, Subtitle H, section 425, 98 Stat. 352, 369.)

11 U.S.C. SECTION 305

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2) (A) there is pending a foreign proceeding; and
(B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise.